



Précis Paper

Unlawful Discrimination

A discussion of unlawful discrimination and the remedies available.

Discussion Includes

- What is unlawful discrimination?
- Harassment and bullying
- Categories of unlawful discrimination
- Remedies available
- Presumption of innocence
- Workplace behaviour recommendations for solicitors' practices

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Unlawful Discrimination

In this edition of BenchTV, Geoff Baldwin (Consultant Lawyer – Stacks Champion) and Alan Conolly (Senior Partner – AR Conolly and Company) discuss an overview of unlawful discrimination touching upon harassment and bullying, and the remedies that are available.

What is unlawful discrimination?

1. Every time people make choices they discriminate by choosing between one thing and another. When Neville Wran became Premier of New South Wales in the 1970's, he introduced the *Anti-Discrimination Act 1977* (NSW). Unlawful discrimination is discrimination on grounds which are prohibited by the legislation, for example: sex, gender, race, age, sexual preference, religion, and so on. These categories hold their origin in trying to prohibit people making choices based upon characteristics that are unrelated to the content of the job.
2. If you are making a choice which affects an individual's livelihood, and you are doing that on the basis of a characteristic or quality which is relevant to the duties of the job, this should not be considered unlawful discrimination. If you are doing this on some extraneous consideration that is actually irrelevant to the content of the job, the likelihood is that it might be unlawful discrimination.
3. The federal legislation does provide some rules and standards, but its structure is to reach out to the state legislation. If there is provision in a state Act that makes the same provision this is okay, and if a state Act provides a more stringent provision, the more stringent provision will prevail. The structure of the various state and federal Acts provides that you unlawfully discriminate if you act on the basis of a characteristic of the group in question, or a characteristic which is usually attributed to the group in question.
4. According to the Human Rights Commission, you will have the same remedies available through either Federal or State avenues if you have a legitimate claim. If you are a government employee, you may choose the tribunal that matches your government department. If you are not a government employee, you may choose the federal sphere as the *Fair Work Act 2009* (Cth) now attaches to constitutional corporations so it therefore affects most businesses.
5. There is a fair level of similarity between the way the various state Acts are constructed. They all discuss unlawful discrimination in the sense of treating someone less favourably due to a particular prohibited reason compared to the way you would treat somebody of another group. It is not unreasonable to ask someone in the recruiting of a job which

requires the exercise of some sort of skill and competence whether they have experience in a particular field, but you may be in trouble if you narrow it down too much.

Categories of unlawful discrimination

6. Categories such as sex, gender, race, age, sexual preference, religion and political affiliation are some of the categories that are commonly referred to when discussing unlawful discrimination.
7. Disability is another major category for unlawful discrimination. If someone who has a disability which plainly means that they are incapable of doing a job they may be applying for, it is not unlawful discrimination to deny them the job. However, the law does provide that you should not discriminate against people with a disability who may be able to do the job.
8. The law goes further to say that employers have an obligation to make reasonable adjustments to cater for potential employees with a disability. For example, if you had someone with some form of dwarfism, and you say they cannot have the job because they would have to reach something from a tall shelf, the expectation is that you buy a step ladder for that individual, and so on.

Harassment and bullying

9. Harassment is a thing which generally is, or should be, against the rules of reasonably run workplaces. Nowadays, most reasonably run workplaces of any size have codes of conduct. Codes of conduct typically say 'every employee must behave in a civil and professional way towards all other employees'.
10. An employer is entitled to make requests relevant to the fulfilment of the job in a manner which is proportionate to the problem. It should not be considered harassment or bullying for an employer to seek the correct performance of an employee, but this may come down to the way in which the situation is handled.
11. The *Fair Work Act 2009* (Cth) has contained a definition of 'bullying' since 2014, and refers to an action which is unreasonable, repeated and has the potential to pose a danger to health and wellbeing.
12. You will find that in all of the various codes of conduct in state and federal legislation, they predominately have the same formulations about bullying. Actions must be reasonable in the sense that it has to be related to the content of the job, and must be proportionate in that you cannot act ferociously over something minor. Failure to be reasonable or

proportionate may cause actions to be classed as harassment or bullying if there is a repeated course of conduct.

13. Bullying and harassment may be said to be gradually moving towards being one concept. However, harassment may continue to be a separate concept in circumstances of racial harassment, or sex based harassment, because it is motivated by racial difference or something along those lines.
14. If it is just behaving badly, you see the term 'bullying' used far more frequently than harassment. Under the Fair Work anti-bullying jurisdiction, the Act provides that if someone is believed to have been bullied, they may make an application to the Fair Work Commission. If the Commission then finds that there has been bullying, they may make an order for the cessation of the bullying. The award of monetary compensation or damages for bullying is specifically excluded. The Commission has no power to award compensation or damages, or anything of that sort for instances of bullying.

Remedies available

15. The remedies available for unlawful discrimination are largely monetarily based. The tribunals do not have a general power to order the employer to do something different in the same way that the Fair Work Commission can order reinstatement for unfair dismissal, even though the Commission does not often do that. Generally, if the Fair Work Commission believes the wrong thing has been done, then it will award an amount by way of compensation.
16. If you satisfy a tribunal that you have been the subject of unlawful discrimination, then it is likely the tribunal will assess your compensation and award that sum. However, tribunals these days, just like the Fair Work Commission, have an automatic preliminary process of conciliation where if a complaint is made, the first step is to attempt reach an agreement about the issue through conciliation.
17. As mentioned above, for acts of bullying, the *Fair Work Act 2009* (Cth) specifically excludes monetary compensation for bullying, and the main remedy is an order that the bullying cease. If it does not cease, it is presumably competent for the person to come back and make a fresh complaint.
18. The Fair Work Commission is a no costs jurisdiction. However, under section 611 of the *Fair Work Act 2009* (Cth), the Commission may make an order for costs in specific situations. The Commission will only award costs to be paid if it is satisfied that a party has been

deliberatively obstructive, meaning it has brought a case which had no reasonable prospect of success and has wasted other parties' money pursuing a hopeless cause.

19. In an ordinary scenario unlike those mentioned in the point above, as the employee if you do not win, the employer cannot ask you to pay their costs, but you will have to pay your own costs whether you win or not. In the case of unfair dismissal, the Fair Work Commission is limited in that the most compensation it can ever award is 26 weeks' pay. It is important when dealing with someone who has been dismissed that they understand the most money they can receive is half a year's pay, and an award of more than 3 months' pay is quite rare.
20. If you have a contract of employment, the Fair Work Commission has a high income threshold which is around \$140,000 a year. If you want to take your employer on above that, you must go to the ordinary Courts and rely upon your employment contract. If you have a contract of employment, it is possible that you could sue civilly for damages for breach of contract.
21. All of the various provisions in the statute concerning unlawful discrimination and/or unfair dismissal have the potential to also be a breach of contract. The *Fair Work Act 2009* (Cth) is written to say that one or other of the modern awards automatically applies to any worker. If the award says something about a particular benefit or rule, then the award applies unless there is a contract which gives you better provisions.

Presumption of innocence

22. There is no presumption of innocence in relation to the behaviour of an employer. Presumption of innocence is a term that relates to the criminal law. There has been a flurry of high profile cases that have recently said it is a bad thing for employers to take action against people on the basis of only allegations.
23. If an allegation is made against an employee, employers are entitled to stand that employee aside with pay whilst the investigation is underway. Employers are entitled to rely upon the interests of the business or the organisation that they are representing and argue that it is a matter of risk management. If on the balance of risk the employer believes the allegation to be a serious one, it is legitimate for the employer to stand this person aside with pay.
24. The employer may continue to pay the employee and tell them they are going to conduct a process to examine the allegations and will make a decision when that process is complete. This may be prejudicial to the employee's interests because there may be a perception that they have been preemptively judged guilty because they have been put

aside. As the employer, you must weigh up the risks, and if the risks of the business outweigh the damage to the employee, it may be necessary to stand the employee aside.

Workplace behaviour recommendations for solicitors' practices

25. Each state has solicitors rules which tend to focus on the professional conduct of solicitors', and the interaction between them.
26. Law practices are no different from any other business. As a practice, you would be at risk if you could not show that you have a code of conduct, a code of ethics, rules about practices, equipment and resources for private purposes, rules about health and safety and anti-bullying provisions.
27. Having policies such as these in the workplace is extremely important. You are not well advised to incorporate the policies into the contract because they can have unforeseen consequences. It is better to have a contract that says employees must comply with the policies, but the policies do not form part of their contract. It should identify them and provide employees with the information about where to find them, for example through the internet. It is advised that as an employer you should have a contract that says you have to abide by the various policies and rules, and you may ask the employees to sign a document that says they have read and understood them.
28. In terms of costs for employees, they try to automate the application process so there is an initial conference with the client where it is said that it is not a no win, no fee outfit. After initial conciliation, either an agreement has been reached, in which case the Fair Work Commission will send you a deed of release, the parties may sign it and then the matter will be considered complete. If there is no agreement reached then the employee must decide whether to forward it to an arbitrated hearing. Once a decision is handed down by the Fair Work Commission, you can only appeal the decision of an arbitrated hearing of the Commission by demonstrating an error of law.
29. In considering the difference between a mediator and a conciliator, a mediator will involve himself or herself much more, in that they will try to intervene between the parties to broker a deal, whereas conciliators have much less involvement. Both conciliators and mediators do not make decisions, only arbitrators can make binding decisions.
30. When advising employees who are suffering a grievance with their employer, it is important to note that many of them do not have a dispassionate and calm view about the situation. This makes it essential to warn clients that even if they are outraged by their employer's

behaviour, they must consider the prospects of success and the financial viability of pursuing such a claim.

BIOGRAPHY

Geoff Baldwin

Consultant Lawyer – Stacks Champion

Geoff was admitted as a lawyer in NSW in 1977. He has extensive experience in industrial relations litigation, commercial and administrative law advice and workplace law. He was recently appointed General Manager of Human Resources in the NSW State Transit Authority. Prior to this, Geoff has had managerial roles at a director's level in the Department of Education and Western Sydney University. Geoff has appeared in employment tribunals as well as instructed matters before the Supreme Court. He is also an experienced investigator in fields such as workers compensation, corrupt conduct and misconduct. As a consultant, Geoff has worked for large organisations in both the public and private sectors.

Alan Conolly

Senior Partner – AR Conolly and Company

Alan Conolly founded the legal firm AR Conolly and Company in 1968 where he remains a partner in full time practice. He has chaired companies in diverse industries including oil, IT, dance, agrochemicals and film. Life Member of the Law Society of New South Wales, publisher of Benchmark.

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