

Employment law update

December 2015



Racial Discrimination - Liability where failure to act on complaints

Employers who fail to adequately respond to complaints about racist, offensive or otherwise discriminatory conduct in the workplace may be vicariously liable for the conduct even if other preventative steps it takes are exemplary.

FACTS

A supervisor working at Australia Post's Port Melbourne depot made a number of racist and offensive remarks to a delivery driver who made pick-ups from the depot such as asking him to "kiss my white arse", calling him "a f@*king black bastard"

and making heavy handed remarks about "going back to Sri-Lanka" and "slave work". The remarks were grossly offensive and deeply distressing to the driver whose national origin is Tamil.

The driver brought a claim of racial discrimination under the Racial Discrimination Act 1975 (Cth) (the Act) against the supervisor and Australia Post in respect of the remarks as well as an alleged physical assault by the supervisor, after which the driver ceased working.

Australia Post denied that the unlawful conduct occurred but, if it did, it submitted that it should not be held responsible because it had taken reasonable steps to prevent it – this is a defence which was available to Australia Post under the Act and one which is commonly relied on by employers. However, the Federal Circuit Court of Australia disagreed.

FINDINGS

The Court found that the racist insults were made and amounted to racial discrimination in breach of the Act because there was no question that they involved a distinction based on the driver's race and colour and national and ethnic origin and that it had the effect of nullifying and impairing his right to just and favourable conditions of work (which in the Court's view includes a right to work in an environment free of racist insult). However, the alleged assault was found not to be motivated by race but related to a safety issue to which the supervisor would have responded in the same way with any other employee who did not have the driver's racial characteristics.

The Court found that Australia Post's training regimes and official position against racial or other unlawful harassment were exemplary. **However, its failure to adequately address the driver's complaints meant that it had not taken all reasonable steps to prevent the supervisor's conduct.** The Court found that what was starkly lacking was an effective response on occasions when allegations of racist conduct were raised. The complaints were met with scepticism at an early stage and nothing happened even after the driver complained directly to senior members of management, including the State Manager. This was despite a clear and unqualified assertion of "*harassment/bullying/racism*" at the depot by another member of staff.

The Court found that there was a "*curious lack of active engagement*" with the complaints and they did not produce any "*significant or energetic investigation*". In the Court's view this showed a pattern of failure to address the complaints. The failure was so stark that it could not be said that the employer took reasonable steps to prevent the racist conduct and it was therefore vicariously liable.

The Court is yet to hear the parties' submissions on appropriate remedy. The driver initially claimed lost income since he last worked in July 2011, compensation for pain, suffering, distress and humiliation in the sum of \$100,000, an apology in unqualified terms and his legal costs.

RISK FOR EMPLOYERS

The experience of racial discrimination and vilification is varied, but is concentrated in a number of social settings including employment and the workplace.ⁱ This is unsurprising given the workplace draws together participants of various races, colours and national and ethnic origins. However, the recent terror attacks at home and abroad have increased public attention on terrorism and national security and may be a pressure point in employee relations in many workplaces. As race, culture and religion become the focus of commentary and debate in the media, employers need to be aware of that this may increase the risk of discriminatory comments and conduct in the workplace – whether inadvertent or wilful.

Employers are reminded they can be liable for racial discrimination in the workplace unless it can be shown that they have taken all reasonable steps or reasonable precautions to prevent the discrimination. What is reasonable is worked out on a case-by-case basis.

THIS CASE DEMONSTRATES THAT AN EMPLOYER WHICH HAS A COMPREHENSIVE POLICY AND TRAINING REGIME **BUT DOES NOT** BACK IT UP WITH EFFECTIVE ACTION IN THE FACE OF COMPLAINTS IS LIKELY TO BE VIEWED AS MERELY PAYING LIP SERVICE TO ITS OBLIGATIONS TO PROVIDE A DISCRIMINATION FREE WORKPLACE.

ⁱ *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act 2015*, Australian Human Rights Commission, page 71.

ACTION POINTS

Employers must ensure that they have a written policy in place which clearly states that racial discrimination or harassment in any form is strictly prohibited and that disciplinary action will be taken if the policy is breached. Most employer policies prohibit discrimination and harassment when using the employer's IT systems and they should also address the use of social media. The policy should also set out clear guidelines or a procedure for dealing with any complaints.

While a written policy is necessary and helpful it is by no means sufficient. Employers must also ensure that:

- The policy is enforced. As the Court pointed out, *"it is one thing to have these policies... but it is another thing to enforce them."*
- All staff are provided with information and training on the policy including any applicable complaints procedure as part of their induction and regularly thereafter. The information and training should also take into account the needs of staff from different cultural and linguistic backgrounds.
- All concerns and complaints are taken seriously and addressed in an appropriate and timely manner and in accordance with the employer's policies and procedures.

- Line managers are given information and training on how to recognise and respond to racial discrimination in the workplace. Senior members of staff must understand what they are required to do if a complaint is made and they should be directed to seek help if they are unsure of their responsibilities or do not have the time to act promptly. Employers often make the mistake of relying on line managers to deal with issues – this is risky if these individuals do not have the necessary skills, information or training.
- Staff members who make a complaint or indicate that they are likely to do so are not victimised, discriminated against or subjected to any other adverse action as a result.

HUNT & HUNT LAWYERS CAN ADVISE ON APPROPRIATE WORKPLACE POLICIES AND PROCEDURES AND PROVIDE TAILORED TRAINING TO MANAGERS AND OTHER STAFF.

See *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 (12 November 2015)

Authors

Gisella D'Costa and David Thompson

NSW Shawn Skyring Martin Dunne	VIC David Thompson Gisella D'Costa	SA Emily Slaytor	WA Darren Miller	TAS Antony Logan Sarah Sealy (mat leave) Stephanie Manning	NT Chris Osborne
--------------------------------------	--	---------------------	---------------------	---	---------------------