

Inadequate Policy Leads To Employer Liability For Sexual Harassment

In a recent decision of the Victorian Civil and Administrative Tribunal ("the Tribunal"), *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914 (12 May 2005) a harassment policy of the employer was found inadequate to protect it from liability for the sexual harassment of an employee.



The Facts

Ms Styles was employed in a butcher's in Elsternwick, Victoria. Shortly after a male employee commenced work Ms Styles complained to her employer about offensive comments made by him in her presence. The employer gave the employee a verbal warning in relation to the conduct, made him read the company's harassment policy and told him if the conduct recurred he would be fired. The harassment policy was written substantially by the wife of the employer. The conduct towards Ms Styles continued. Ms Styles complained again to her employer. She alleged he did not do anything about the behaviour and told her

he had not seen or heard anything. The employer denied this. Ms Styles was later made redundant the day after an altercation with the employee about whom she had complained. She brought a complaint against her employer alleging sexual harassment and sexual discrimination on the basis that her employment was terminated because she was a woman.

The Decision

The Tribunal considered that Ms Styles had been sexually harassed by her co-employee in breach of the Victorian anti-discrimination legislation. The Tribunal found that the employer did not take reasonable precautions to prevent the sexual harassment and was therefore vicariously liable for the conduct. This finding was made despite the fact that the employer had a harassment policy displayed in the workplace and gave the employee concerned a warning. The Tribunal found that the harassment policy was inadequate and not implemented properly to prevent the sexual harassment. This was for the following reasons:

- The policy dealt with harassment in general terms only and could very easily have been interpreted to cover only workplace bullying or other workplace dispute;

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- It did not give examples or explain exactly what kinds of harassment would breach equal opportunity or anti-discrimination legislation
- It did not make it clear that harassment could be constituted by word or actions;
- It did not explain what discrimination is prohibited by anti-discrimination legislation;
- It did not explain how the legislation defines discrimination or sexual harassment;
- It did not explain what attributes on which discrimination is prohibited under the legislation;
- It did not set out any contact person to whom one might go if one feels one has been harassed;
- It did not set out clearly any complaint handling process;
- It did not give information about external complaint handling mechanisms;
- The employer did not hold a collective meeting of employees to discuss the formulation, the implementation or the meaning of the policy;
- The employer gave the offending employee a warning however did nothing about Ms Styles' many other complaints; and
- The employee continued the conduct of a sexual nature in relation to Ms Styles after being warned and despite having read the policy.

Ms Styles was awarded \$8,000 compensation for the breach of anti-discrimination legislation.

The Tribunal found that the complaint of sexual discrimination was not made out because Ms Styles' employment was not terminated because she was a woman. The Tribunal found that in similar circumstances the employer would not have treated a man differently.

Implications for Employers

It is not sufficient to just have a written policy if an employer wishes to avoid a finding of vicarious liability for sexual harassment or discrimination in the workplace. It is imperative to have a well-drafted and properly implemented policy. For example, the policy should explain the definitions of sexual harassment and discrimination under the legislation, give clear examples of prohibited conduct and provide a complaint handling system. A meeting should be held with employees to discuss the policy and management should follow up complaints.

Increase in Salary Caps for Unfair Dismissal Applications

The salary cap for award-free employees in applications for relief from alleged unfair dismissal has increased from \$90,400 to \$94,900 effective from 1 July 2005 in both New South Wales and at the Federal level.

Double Super Payment Risk for Employers

Under the Superannuation Guarantee (Administration) Act 1992 ("the SGC Act"), if an employer does not pay superannuation contribution/s by the prescribed date (being 28 days after the end of the immediately preceding quarter), then a Default Assessment may be issued by the Australian Tax Office ("ATO") imposing liability for the superannuation guarantee charge ("SGC") equal to the amount of the unpaid contributions or "shortfall", together with interest and administration components.

From our observations, the ATO has recently commenced auditing companies to impose the SGC in circumstances of late payment.

The SGC is payable to the Commissioner of Taxation who then has an obligation under the SGC Act to contribute to a complying

superannuation fund or the Superannuation Holdings Account Reserve an amount equal to the charge on behalf of employees. Therefore the situation may arise where an employer pays its superannuation contributions late and incurs the SGC equal to the amount of unpaid contributions, plus, interest and administration

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components. Due to the redistribution provisions of the SGC Act, the employees receive a double benefit.

Is it possible for an employer to lodge an objection to the Default Assessment with the ATO in these circumstances? Alternatively, is the employer entitled to a refund of the late paid superannuation contributions from the trustee of the superannuation fund?

In *Jarra Hills Pty Ltd v The Federal Commission of Taxation* (1997) 97ATC 2132, the applicant argued that a Default Assessment was unfair and inequitable because it required the applicant to pay superannuation contributions twice for the same employees plus penalties in circumstances where he failed to pay the contributions by the due date. The Administrative Appeals Tribunal ("AAT") found that:

- there is no provision in the SGC Act which allows for any extension of time beyond the date prescribed in the Act nor any discretion given to the Commissioner of Taxation or to the AAT to overlook a failure to make required levels of superannuation contributions by that date;
- notwithstanding that the result of the Default Assessment is that the total cost of superannuation to the applicant and the benefits derived in respect of certain employees have been higher than intended by both the applicant and the SGC Act, by virtue of the SGC Act, there is nothing that either the ATO or the AAT can do to alter that position;
- the SGC Act under which the Default Assessment was issued in this case was clear and unambiguous and the liability of the assessment for the SGC was correctly imposed by the ATO pursuant to the SGC Act; and
- notwithstanding that the ATO admitted that any contribution subsequent to the due date in respect of a prior period when the required level of superannuation contributions are payable can be utilised as a contribution to be taken into account in a subsequent year, this is of no benefit where the employer only becomes aware of the shortfall after the subsequent year has ended.

This case has been referred to and confirmed in a number of other decisions of the AAT including *Kancroft Pty Ltd v The Commissioner of Taxation*



[2004] AATA 1991 and in *Williams v The Commissioner of Taxation* [2005] AATA 113. In *Williams*, the AAT made the following comments in relation to the fact that the ATO was able to levy and recover a SGC equal to the outstanding superannuation entitlements which were not paid by the due date:

"There is unfortunate legislative lacuna raised by the facts of this case where the Applicant paid superannuation contributions to the Trustee late, it still has incurred a Superannuation Guarantee Charge liability. The Respondent might reconsider the working of the Superannuation Guarantee (Administration) Act in this respect and consider whether some legislative or administrative variation of the Superannuation Guarantee Charge liability regime is necessitated where a liable employer makes late superannuation contributions direct to the trustee."

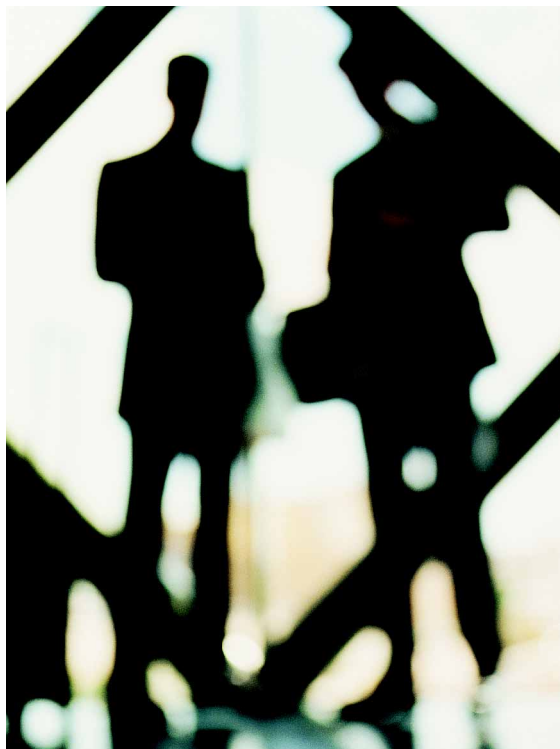
"...employer entitled to a refund of the late paid superannuation contributions..."

In all of these cases, the AAT upheld the decisions made by the ATO. In our view this is not surprising given the provisions of the SGC Act do not provide any discretion to the ATO in relation to late payment of SGC contributions and the inability of the AAT to effectively overrule the decision of the ATO in relation to the ascertainment of the SGC.

In *Jarra Hills* reference is made to the potential application of Section 23(7) of the SGC Act which permits a superannuation guarantee contribution which is paid after the due date to be taken into account in the subsequent quarter for any employees who remain employed by an employer, provided that it is not made more than 12 months before the beginning of that quarter. It is noted in *Jarra Hills* this provision is of no effect whatsoever to an employer who does not become aware of a shortfall in the superannuation guarantee contribution until after the expiration of the subsequent year.

Implications

An objection by an employer to a Default Assessment is unable to succeed as there is no discretion in the SGC Act for this to occur.



Similarly an argument based on equitable principles that the late superannuation contributions should be refunded by the super trustee to the employer is unlikely to succeed. Under equitable principles, if a contribution to a superannuation fund has been made by mistake there is a prima facie obligation on the part of the trustee to refund the contribution unless the payment would be unjust: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. The principle is only applicable if it can be shown that the contributions were paid to the

trustee of the superannuation fund by the employer due to a mistake of law or a mistake of fact. In the *David Securities* case, the High Court held that a mistake includes a belief as to the existence or non-existence of a state of affairs which turns out to be mistaken. In most circumstances of payment of superannuation contributions pursuant to legislation such as the SGC Act it would not be possible to argue that it was made by either a mistake of fact or law.

There is a statutory provision contained in Section 117 of the Superannuation Industry (Supervision) Act 1993 ("SIS Act") which permits payment to an employer to be made by a trustee of a superannuation fund in very limited circumstances. However these provisions are clearly linked to the concept of "mistake" above and therefore unless it can be established that the payment was actually a mistake, then no obligation will be imposed on the trustee of the fund to repay the contributions.

Legislative reform

Clearly legislative reform is required to correct this anomaly. In a press release on 10 May 2005, the Assistant Treasurer, the Honourable Mal Brough MP stated that with effect from 1 January 2006, the Federal Government will amend the SGC Act to allow employer contributions for an employee to a superannuation provider to be made within 30 days of the due date to be used to offset the portion of any SGC for the quarter that relates to that contribution. However, this proposed amendment to the SGC Act is not yet in place and currently has no effect. Employers should therefore be extremely cautious to ensure superannuation contributions are paid before the prescribed date.

2005/2006 Tax-Free Threshold for Bona Fide Redundancy Payments

The tax-free threshold to be applied to bona fide redundancy payments for the 2005/2006 financial year are now a base limit of \$6,491 and \$3,246 per complete year of service.

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