

**ADDRESSEE:** ALL MEMBERS  
**FROM:** CHIEF EXECUTIVE OFFICER  
**DATE:** 26 FEBRUARY 2008  
**SUBJECT:** MONTHLY WORKPLACE RELATIONS UPDATE

Dear Member,

Welcome to our first Workplace Relations Update for 2008. We hope that you find the following information helpful.

This update deals with:

1. The Charter of Human Rights and Responsibilities Act 2006 (Vic)
2. Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008
3. Where the dismissal of an employee was discriminatory even though it was lawful under the Workplace Relations Act
4. Liability for bullying
5. Dishonesty was sufficient grounds for termination

### **1. The Charter of Human Rights and Responsibilities Act 2006 (Vic)**

In Australia, human rights are given some protections offered by way of common law and legislation. However, there is no federal bill of rights specifically for the protection of human rights, nor is there consistent legislative protection of human rights between states.

Victoria is the first state to enact formal protection of human rights by introducing a *Charter of Human Rights and Responsibilities*. The charter will ensure that human rights are valued and protected within government and the community. The Charter was passed by Parliament in July 2006, and comes into effect on 1 January 2008. The Charter is based on human rights laws that currently operate in the ACT, the United Kingdom and New Zealand.

Human rights can be defined as fundamental rights inherent in every individual on the basis of humanity. Human rights are entitlements that belong to every human being regardless of age, sex or culture. Human rights are internationally recognised principles, as articulated by the United Nations and agreed to by a vast majority of nations. International human rights provide a guideline to governments on how to treat and care for their citizens.

The Charter is important for the following reasons:

- It reinforces protection in existing laws and provides for the protection of 'new' rights such as freedom of expression, freedom from forced work and protection, against cruel, inhuman and degrading treatment;
- The Charter ensures accountability and transparency in government, sets human rights as a priority for government, and ensures that government takes human right into account when making laws and delivering services;

# UPDATE

- The Charter increases public awareness of human rights; and
- The Charter is a statement of values and principles for the Victorian community.

Part 2 of the Act sets out what rights are to be protected. The Act focuses on civil and political rights. Included in this broad area are rights such as the right to life, the right to humane treatment when deprived of liberty, freedom of expression, freedom of association, the right to privacy and reputation, freedom of thought, conscience, religion and belief, cultural and property rights, the right to a fair hearing, rights in criminal proceedings, rights of children in the criminal process, the right not to be tried or punished more than once. The Act reflects that rights should not be absolute, but must be balanced against each other and against other competing public interests.

The main implication of this Act for our members is that the Act will apply to public authorities. Section 38 of the Act provides that it is unlawful for a public authority to act in a way that is incompatible with a human right protected by the Act or to fail to give proper consideration to a human right protected by the Act. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the Courts. In conjunction with the general law, the Charter provides a basic standard and a reference point for discussion and development of policy.

The definition of public authority is contained in section 4. This definition determines the limits of the duty contained in section 38. Section 4 provides that a public authority is a public official within the meaning of the **Public Administration Act 2004**. This includes public sector employees, certain judicial employees, and certain parliamentary officers, persons holding a statutory office or a prerogative office and directors of public entities. Other bodies that will be bound by the Charter include Victoria police, local councils and entities created by statute that perform a public function.

The Charter does not apply to private businesses or entities or non-government organisations, except to the extent that they may be exercising functions of a public nature on behalf of the state or a public authority.

## **Acting on behalf of the State**

The obligation to comply with the Charter extends beyond 'core' government to other entities when they are performing functions of a public nature on behalf of the State. This reflects current government practice whereby organisations are enlisted to perform and manage some government services. The term 'acting on behalf of the State' is not intended to be confined to situations of agency in the strict legal sense.

The degree of government regulation and control of the functions being performed will be one factor to consider. For example, non-government schools are independent of government and, although subject to regulation, are not controlled by governments. As such, they are not deemed to be acting on behalf of the State for the purposes of the Charter and will not be covered by the Charter.

# UPDATE

## **Determining whether a function is of a public nature**

A number of factors may be taken into consideration when determining if a function is of a public nature. These factors are not exhaustive and are meant to provide some guidance to government and the Courts. The fact that one or more of these factors exists does not necessarily mean that the function is of a public nature.

Some factors that may be taken into account include whether the function is conferred on the entity by or under a statutory provision; whether the function is connected to or generally identified with functions of government; whether the function is of a regulatory nature; whether the entity is publicly funded to perform that function; and whether the entity that performs the function is a company whose shares are held by or on behalf of the State.

## **The Victorian Equal Opportunity and Human Rights Commission**

Part 4 of the Act confers additional functions on the Equal Opportunity Commission Victoria, which has been renamed the Victorian Equal Opportunity and Human Rights Commission. The Act confers responsibility to the Commission to be an independent monitor of the Charter. The Commission will report each year on the operation of the Charter. When requested by a government department, the Commission may review a public authority to determine the consistency of its programmes and practices with human rights. The Charter does not allow for complaints about human rights to be made to the Commission, as this is the jurisdiction of the Courts and Tribunals.

## **2. Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008.**

On 13 February 2008, Labor introduced the Workplace Relations Amendment Bill ('the Bill'). The Opposition has notified the Senate that it will refer the Bill to a Senate inquiry, with a reporting date of 28 April 2008. The Coalition holds a majority in the Senate until July 2008. If the notice of motion succeeded, the Bill would go to the Senate Employment, Workplace Relations and Education committee.

The Bill will make the following key changes to the Act:

### **AWA's**

AWA's will not be offered to federal public servants from 13 February 2008. AWA's cannot be made after the commencement date of the Bill. AWA's made and lodged before the commencement date, or made before the commencement and lodged within 14 days after that date, would continue to operate until they are terminated or replaced, Individual Transitional Employment Agreement (ITEA's) will be introduced. ITEA's can be made by an employer that had at least one employee on an AWA at 1 December 2007. ITEA's can operate until 31 December 2009. ITEA's can be used for both existing and new employees.

### **The no-disadvantage test**

The 'fairness test' will be replaced by a no-disadvantage test for both ITEA's and collective agreements. The Workplace Authority Director will have to be satisfied that a workplace agreement would not reduce employees' overall terms and conditions of employment when compared with a reference instrument, such as an otherwise applicable collective agreement, an award, or if there is no such instrument, an appropriate designated award.



# UPDATE

ITEA's (existing employees), employee and union collective agreements will not operate until they are approved by the Workplace Authority Director, on the basis that they pass the no-disadvantage test. ITEA's for new employees, employee and union greenfields agreements would commence operation when lodged with the Workplace Authority Director, but would cease to operate if they were found to fail the no-disadvantage test.

## **Termination of agreements**

Employers will no longer be able to unilaterally terminate a collective agreement that has passed its nominal expiry date, and return employees to a limited number of minimum standards.

A collective agreement will only be able to be terminated where the parties agree, or by the AIRC where termination would not be contrary to the public interest. In the event that an agreement is terminated, employee's terms and conditions of employment will be determined by whatever award or agreement would have applied to them but for the terminated agreement.

## **Awards**

The process of 'modernising' awards will commence. The AIRC will be asked to oversee this process.

Modernised awards will:

- protect 10 important entitlements like penalty rates and overtime;
- provide industry-specific detail on the 10 National Employment Standards;
- ensure a fair safety net for Australian employees, including outworkers;
- ensure minimum award entitlements are relevant to the Australian economy and modern work practices;
- not be overly prescriptive; and
- will allow for flexible work arrangements for employers and employees who rely on awards as well as provide an appropriate benchmark for collective agreement making.

At this stage there have been no changes to the Workplace Relations Act and it appears that there won't be for some months yet. VHIA will inform members of any changes as they occur.

### **3. Where the dismissal of an employee was discriminatory even though it was lawful under the Workplace Relations Act**

A recent decision in the Victorian Civil and Administrative Tribunal (VCAT) highlights the danger for employers who dismiss an employee even after they have complied with the requirements of the Workplace Relations Act (the Act).

Section 659 of the Act makes it unlawful to terminate an employee for a temporary absence from work because of illness or injury, unless the absence is unpaid and extends beyond three months. In this case, VCAT found that it was unreasonable of the employer to expect a possible return-to-work date from an injured worker because he was certified unfit on a long-term basis. VCAT found that the dismissal of the employee was discriminatory under the Equal Opportunity Act (Vic).

# UPDATE

## Facts of the case

Mr Duma, a mechanic employed by Mader International Pty Ltd injured his spine during work in 2005. He continued to suffer with chronic pain and subsequently developed depression. He was later certified unfit for work for an indefinite period. Mader sacked the worker after he had been off on unpaid sick leave for over three months and had failed to respond to repeated letters that had asked him to provide a possible or expected return-to-work date.

## Findings of VCAT

VCAT rejected Mader's argument that because the worker's compensation claim had been rejected and he failed to communicate, termination was a reasonable action. VCAT found Mader's requirement for a return-to-work date unreasonable, which the worker could not comply with due to his impairment under s9 of Victoria's Equal Opportunity Act 1995. The Deputy President stated that 'It may well be that, after a lengthier period of absence from work, such a requirement or condition might have been reasonable, but this is not the case here.'. She went on to say that Mader's wish to have an injured worker return to work as soon as possible might have been appropriate for an employee with a less serious injury or absent for a short period of time, but it was not appropriate for an employee who was certified to be unfit for all work on a long-term basis.

VCAT found the worker was indirectly discriminated against under the Equal Opportunity Act and ordered the company pay the worker \$4,000.

The lesson for employers is that although you may be compliant with section 659 of the Workplace Relations Act, it does not prevent a dismissed employee from bringing an action in another jurisdiction on alternative grounds, such as discrimination.

*Duma v Mader International Pty Ltd* (Anti-Discrimination) VCAT 2288

## 4. Liability for bullying

The Court of Appeal in NSW found that Nationwide was directly and solely liable for an 'extreme' form of bullying perpetrated by its fire and safety officer, and ordered to pay \$1.9m in damages to a traumatised labour-hire security guard.

## Facts of the case

An ISS Security guard, Mr Naidu, whose services were made available to Nationwide under a contract between ISS and Nationwide, suffered a psychiatric illness after enduring years of 'deliberate' and 'vindictive' bullying by his supervisor, a Nationwide employee. Nationwide sacked the supervisor in 1996.

Mr Naidu sued Nationwide and its employer for damages, alleging they failed their duty of care to provide a safe workplace. The Court heard that the supervisor physically threatened and racially abused Mr Naidu.

# UPDATE

## Findings of the Court

In the first instance, the companies were found 65% (Nationwide) and 35% (ISS) liable for the officer's conduct. Nationwide and ISS appealed the decision separately. ISS was successful in having damages set aside; otherwise all other grounds of appeal were dismissed. The Court of Appeal found the officer was the 'embodiment' of Nationwide and, as that representative, perpetrated conduct on the guard that was 'prolonged, abusive, intimidating and physically threatening'.

The Court also noted that the officer had significant seniority and authority within Nationwide. 'In my opinion, Mr Chaloner's (officer) position and his responsibilities were such that he was in fact the "mind and will" of Nationwide News so far as the management of its security requirements were concerned,' Beazley said. 'That responsibility included supervision of Mr Naidu's (guard) work. 'In his "appropriate sphere", namely, the arrangement and implementation of security arrangements for Nationwide News, Mr Chaloner was an embodiment of the company.'

The Court of Appeal held that Nationwide was directly liable for the actions of the supervisor and that Nationwide and ISS had both breached their duty of care to Mr Naidu and both were liable for the damage suffered by him.

This case is relevant for employers as it illustrates the willingness of the Courts to hold employers responsible for the actions of their employees. It is therefore important that employers have a policy for workplace bullying, employees attend training about workplace bullying and that any allegation of bullying is investigated immediately. If a claim is found to have substance, then employers should act swiftly to ensure that victims are protected and bullies are dealt with.

*Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor [2007] NSWSCA 377*

## 5. Dishonesty was sufficient grounds for termination

Despite the employee being employed for more than 10 years with an untarnished record, the AIRC found that his dismissal was justified on the basis that he submitted false claims for reimbursement of expenses, because an employer was entitled to expect a certain level of trust from its employees.

### Facts of the case

Mr Baes was employed as a courier and was later appointed as an operations agent. In 2005, the employer introduced a programme that enabled employees to claim for reimbursements for an amount of \$99 per annum for expenditure on a range of health items for themselves.

In May 2007, the employee made a claim under the programme. The employee could not find all of the relevant receipts. He had one receipt for \$82, so he placed a '1' in front of the '\$82'.

He was terminated after an investigation found that he had deliberately falsified a receipt that he had submitted for reimbursement of expenses.



# UPDATE

## Findings of the AIRC

The AIRC found that Mr Baes deliberately acted in a dishonest manner that was designed to obtain a financial benefit. Such dishonesty strikes at the level of trust an employer should be able to expect from an employee. His dismissal was held not to be harsh, unjust or unreasonable.

*C Baes v Federal Express (Australia) Pty Ltd [2008] AIRC 22*

For any enquiries, comments or suggestions, please e-mail Natasha Fletcher at [nfletcher@vhia.com.au](mailto:nfletcher@vhia.com.au)



**Alec Dioneff**  
Chief Executive Officer

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