Law at Work Report

Devine Law at Work

SEPTEMBER 2009

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ARE YOU READY?
MORE CHANGE TO WORKPLACE LAW JUST AHEAD

While the commencement of the *Fair Work Act 2009 (FWA)* on 1 July 2009 introduced some initial changes to Federal workplace regulation, the majority of the major changes brought about by the FWA have yet to take effect. Modern Awards and National Employment Standards will commence on **1 January 2010** and all Company employers need to ensure that both their systems and their people are ready. What you need to do to be ready is explained on **pages 2 and 3** of this *Law at Work Report.*

MODERN AWARDS CONTROVERSY:
RATES TO INCREASE COSTS AND DECREASE PAY

The Federal Government's award modernisation process was intended to ensure that employers and employees the subject of the Federal workplace relations system would have the benefit of relatively simple awards and certainty regarding basic terms and conditions of employment. However, on **2 September 2009**, just a few months before Modern Awards are to take effect, the AIRC issued a decision admitting that the rates of pay in some of the new awards will result in greater costs for employers while others will reduce the take home pay of workers. As a consequence, the AIRC has decided that the new rates contained in Modern Awards will be delayed by six months and increases/ decreases will then be introduced in five equal instalments over four years. What this decision means for your Company is outlined on **pages 4 and 5** of this *Law at Work Report*.

THE HIGH PRICE OF HARASSMENT:
EMPLOYER ORDERED TO PAY FORMER EMPLOYEE $466, 000 IN DAMAGES

A recent decision of the Federal Court has confirmed the growing trend towards substantial damages awards arising from breaches of anti-discrimination legislation. Details of this significant decision are outlined on **pages 8 to 11** of this *Law at Work Report*.

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Discrimination Law Update: Important Changes Take Effect

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ARE YOU READY? FURTHER CHANGE TO WORKPLACE LAWS AHEAD

Just when Company employers are getting used to the changes introduced by the *Fair Work Act 2009 (FWA)* in July this year, the need to get on top of more significant changes, which will take effect on 1 January 2010, has arisen. Those more significant changes derive from Modern Awards and National Employment Standards (NES) which, together with the minimum wage, represent the minimum safety net of terms and conditions of employment for Company employees.

Modern Awards

In March 2008 the Federal Government instituted an award modernisation process to be conducted by the Australian Industrial Relations Commission (AIRC). This process, which must be completed by 31 December 2009, will result in thousands of Federal awards and Notional Agreements Preserving State Awards (NAPSA's) being reduced down to hundreds of simpler Modern Awards. The AIRC is conducting the process in four stages and has to date released Modern Awards for priority, Stage 2 and Stage 3 Modern Awards. Stage 4 Modern Awards are due for release in December 2009.

All Modern Awards will take effect on **1 January 2010**. Ahead of this date, employers need to take steps to ensure compliance. For a guide to what you need to so, see the '**To Do**' box on the next page. Failure to comply with a Modern Award can expose you to the risk of substantial penalties so the sooner you act the better.

The award modernisation process is a remarkably ambitious project and the limitations of what can be achieved have begun to appear. Both employers and unions alike in many industries have reacted unfavourably to the content of some Modern Awards, in particular the wages and other rates contained in them. As recently as 2 September 2009, just a few months before the commencement of Modern Awards, the AIRC announced that the wages and other rates contained in Modern Awards would be delayed by six months, not taking effect until 1 July 2010. Further, the AIRC announced that some Modern Awards would include a phasing in provision, allowing for the proposed wage and other rates to be implemented in five equal instalments (either increasing or decreasing the rate of pay as the case may be) over a four year period. This decision is discussed in more detail on pages **4 and 5** of this *Law at Work Report*.

National Employment Standards

From 1 January 2010, *all* (award and non-award) employees the subject of the federal workplace relations system will have the benefit of ten key entitlements known as National Employment Standards (NES). While many of these will already be familiar to many employers and their employees, having their origins either in test case award provisions or in the Australian Fair Pay and Conditions Standard which was introduced in 2006, the less familiar will require closer attention.

The 10 NES are as follows: (1) maximum ordinary hours; (2) request for flexible working hours; (3) notice of termination and redundancy pay; (4) parental leave; (5) annual leave; (6) personal carer's leave and compassionate leave; (7) community services leave; (8) long service leave; (9) public holidays; and, (10) Fair Work Statement. Details concerning each of the NES are available online from **www.devinelaw.com.au**—just follow the link to 'Legal Info' then '**Fair Work Fact Sheets'**. The key compliance obligations of employers which emerge from the NES are:

- you will need to ensure that employees are not working ordinary hours of more than 38 hours per week—if they are, you will need to ensure that the remuneration paid to employees does in fact reflect the extra hours required (i.e. the calculation is defensible, not just notional);

- you will need to ensure that your staff responds to and assesses appropriately any request for flexible working hours made by an employee with a child aged 5 years or less or with a child aged 18 years or less who has a disability;

- you will need to amend your procedures for parental leave are updated (e.g. statutory declarations are no longer required) and that your staff respond to and assess any application for extended parental leave in an appropriate manner;

- you will need to continue to ensure that the amount of notice or payment in lieu thereof which is provided in the event of dismissal is compliant with the minimum periods provided for in the FWA - the content of employment contracts, workplace agreements and workplace policies need to be the same as or more generous than the minimum provided for in the FWA;

- when dismissing non-award employees as a result of redundancy you must, for the first time, ensure that they, together with award employees, receive redundancy pay in addition to notice;

- you must issue new employees with a Fair Work Information Statement either at the commencement of employment or as soon as reasonably practicable after its commencement—these will be developed by and available from Fair Work Australia in due course.

Ahead of the commencement of the NES on 1 January 2010, employers need to take urgent steps to ensure compliance. For a guide to what you need to do, see the 'To Do' box on this page. Failure to comply with a NES can expose you to the risk of substantial penalties, so the sooner you act the better.

DO YOU NEED HELP?

The most efficient and cost effective way you can *ensure* that your Company and its staff are up to date and compliance ready by 1 January 2010 is to bring in an expert.

Elizabeth Devine of Devine Law at Work can do exactly what you need, for a **fixed fee** and in just a few short weeks.

To find out more, simply give Elizabeth a call on 02 8985 7312 or send an email to elizabeth@devinelaw.com.au

TO DO LIST

MODERN AWARDS

1. Identify all Modern Awards which will apply to your employees.

2. Identify the key differences and similarities between industrial instruments which currently apply (Awards and NAPSA's) and the Modern Award(s) which will apply.

3. Review and update systems, as applicable, to ensure compliance with the Modern Awards.

4. Review employment contracts (including letters of offer and appointment) to ensure compliance with the Modern Awards.

5. Educate key staff (including Payroll staff, Line Managers and internal advisers) of how the Modern Award(s) will impact the business.

6. Inform all staff of any changes which will directly impact on them.

NATIONAL EMPLOYMENT STANDARDS

1. Review and update all key employment documents (including contracts, letters of offer and appointment and policies and procedures) to reflect the NES in relation to both current and future employees.

2. Develop new policies and procedures in relation to community service leave and the right to request flexible work hours.

3. Implement new and updated policies and procedures, together with other updated employment documents (e.g. contracts).

4. Educate internal advisers and Line Managers about the changes represented by the NES.

5. Inform all staff of the NES and how this will impact on them.

MODERN AWARDS CONTROVERSY: RATES TO INCREASE COSTS AND DECREASE PAY

On 2 September 2009 the Australian Industrial Relations Commission (AIRC) issued a decision in which it admitted that the Federal Government's requirement that Modern Awards neither disadvantage employees nor increase costs for employers was not achievable. Having identified this fact, the AIRC proceeded to announce a transitional arrangement in relation to clauses contained in Modern Awards which will result in either increases or decreases in payments made to employees. At this stage, the transitional arrangement will apply only to priority and Stage 2 Modern Awards. However, it is likely that the AIRC will apply the same approach to Stage 3 and Stage 4 Modern Awards.

As a consequence of the AIRC's decision:

- Two model transitional clauses will be included in priority and Stage 2 Modern Awards where applicable; a commencement and transitional clause and a phasing clause.

- The model transitional clauses will apply only in respect of **minimum wages** (including junior wages, employees the subject of training arrangements and employees with a disability), **casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances**. All other provisions in a particular Modern Award will take effect on **1 January 2010**.

- The model commencement and transitional clause to be inserted in priority and Stage 2 Modern Awards will provide (among other things) that: the monetary obligations contained in the Award may be absorbed into over award payments, together with an express statement that employers are not required to maintain or increase any over award payment; and, that a reduction in take home pay is not intended (by either the Award or the transitional arrangement) and where there is such a reduction the employee may apply to Fair Work Australia for an order to remedy the situation.

- Where the wages and related clauses in the Modern Award would result in either an increase or decrease in payments made to employees, the model phasing provision will be inserted into the priority/Stage 2 Modern Award. This will provide for: the increase/decrease in payments to an employee to be phased in over four years in **five equal instalments**. The first instalment will take effect on 1 July 2010 and the last on 1 July 2014.

- The instalment arrangement will only apply to the difference between the minimum wage provision in the Modern Award. Fair Work Australia will review the minimum wage for each Modern Award each July, with its first decision due on 1 July 2010. In the event of a higher wage or other rate being determined by Fair Work Australia, the difference for the purposes of ensuring compliance with the phasing in arrangement will be between any new minimum wage/other rate determined by Fair Work Australia and what is being paid by the employer *not* the difference between the rate being paid prior to1 January 2010 and the original rate(s) in the Modern Award.

- As a consequence of the phasing in provision, the payment rate applicable prior to the Modern Award taking effect on 1 January 2010 will continue to apply until 1 July 2010.

- The phasing in provision will not be included automatically in a priority or Stage 2 Modern Award; the AIRC will decide whether or not it will be included in a given award.

- The model transitional provisions will apply to employers who are involved in an industry covered by a Modern Award both prior to and following 1 January 2010; meaning that employers who start up on or after 1 January 2010 will not have an advantage over employers already established in a given industry.

- Employers impacted by the phasing in provision may choose to simply apply the wage and other rates provided for in the Modern Award on and from 1 July 2010 in order to avoid the detailed calculations that compliance will involve.

All employers will need to identify whether or not the phasing in clause will apply to any or all of the Modern Awards which have application to their employees. If it does apply, employers will need to: (1) inform staff of the delay in application of the rates included in the Modern Award to 1 July 2009 and explain the phasing in process over four years; and (2) ensure that Payroll staff keep a close eye on wage increases each July, while closely calculating the required increase/decrease in rates to be made each July to ensure compliance with the phasing in clause.

On the one hand, the AIRC's decision will provide enormous relief to employers who were facing significant increases in costs as a result of the rates introduced by applicable Modern Awards; for example, in the Retail Industry. However, on the other hand, the AIRC's delays further the transition to a modern and simplified system of workplace regulation (bearing in mind the fact that changes to Federal workplace laws have already been in transition for the past three years, since the commencement of the Work Choices amendments). The system of phasing in increases/decreases to rates will inevitably create another headache for employers trying to comply with the *Workplace Relations Act 1996* (while it continues to apply) and the *Fair Work Act 2009*. The hope for a smooth and timely transition from a disparate mix of Federal and State Awards to a streamlined Federal system has proven to be too audacious to deliver just yet.

Employers impacted by the phasing in provision may choose to simply apply the wage and other rates provided for in the Modern Award on and from 1 July 2010 in order to avoid the detailed calculations that compliance will involve.

DO YOU NEED HELP in identifying whether the AIRC's decision will impact on Modern Awards in your Company? Just give Elizabeth a call on 02 8985 7312 or send an email to elizabeth@devinelaw.com.au

AIRC ISSUES STAGE 3 MODERN AWARDS

On **4 September 2009** the AIRC issued the Stage 3 Modern Awards. These will impact on 49 industries and occupations, including:

- air pilots, aircraft cabin crew, ground staff and airport employees;
- the book industry;
- the broadcasting and recorded entertainment industry;
- commercial sales;
- the educational services industry;
- the electrical power industry;
- the food, beverage and tobacco manufacturing industry;
- journalists;
- marine and maritime industries;
- the meal industry;
- the pharmaceutical industry;
- the stevedoring industry;
- the timber industry;
- the vehicle manufacture, repair, services and retail industry; and
- the wine industry.

You can find out more at www.airc.gov.au

Just follow the link to 'Award Modernisation'

DISCRIMINATION LAW UPDATE

IMPORTANT CHANGES TO AGE AND DISABILITY TAKE EFFECT

On 5 August 2009 key changes to the *Age Discrimination Act* (Cth) (ADA) and *Disability Discrimination Act 1992* (Cth) (DDA) took effect as a consequence of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Amendment Act) receiving Royal Assent. These changes apply to alleged unlawful age and disability discrimination which occurs on or after **5 August 2009**.

The changes to the DDA originated from 2004 report by the Productivity Commission into Federal disability law. Among other things, the Productivity Commission recommended that the duty to make reasonable adjustments be included in the DDA as an explicit duty, together with a stronger defence on the ground of unjustifiable hardship. These recommendations are reflected in the recent amendments to the DDA.

Age Discrimination

The ADA prohibits discrimination against a person based on his/her age in a range of different circumstances, including employment. Prior to 5 August 2009, where an act was done for two or more reasons, an act was taken to be for the reason of age (thereby potentially breaching the ADA) only if age was the **dominant reason** for the act. From 5 August 2009 onwards, where an act is done for two or more reasons, age needs only to be one of the reasons not necessarily the dominant one. In practice, this amendment will mean that it is easier for age discrimination claims to be proven. To date there have been no successful claims under the ADA against employers

Disability Discrimination

The DDA prohibits discrimination against people with a disability in a range of circumstances, including employment. The term 'disability' is broadly defined in the DDA and includes both physical and mental disabilities, as well as existing, past and presumed disabilities.

As with other anti-discrimination legislation, an employer may breach the DDA as a result of either direct discrimination or indirect discrimination. Following the amendments to the DDA, a person (the discriminator) will **directly discriminate** against another person *if* either: (a) because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favorably than the discriminator would treat a person without the disability in circumstances that are not materially different; or, (b) the discriminator does not make or proposes not to make **reasonable adjustments** for the person and the failure has or would have the effect that the person is treated less favourably than a person without the disability would be treated in circumstances that are not materially different (the requirement for reasonable adjustment does not make circumstances materially different).

Further, an employer will be held to have **indirectly discriminated** against a person *if* either: (a) the discriminator requires or proposes to require, the aggrieved person to comply with a requirement or condition and, because of the disability, the aggrieved person is not able to comply with it and the inability to comply will disadvantage the aggrieved person, *unless* the requirement or condition is reasonable in the circumstances; or, (b) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition and, because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made **reasonable adjustments** for the person but the discriminator does not do so or proposes not to do so and the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

Reasonable adjustments

An adjustment will be a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on

the employer. Whether an adjustment will involve unjustifiable hardship will be determined by reference to all relevant circumstances, including: the nature of the benefit or detriment likely to accrue to, or to be suffered by the employer; the effect of the disability of any person concerned; the financial circumstances, and the estimated amount of expenditure required to be made by the employer; the availability of financial and other assistance to the employer; and, any relevant action plans given to the Australian Human Rights Commission (formerly known as the Human Rights and Equal Opportunity Commission).

Inherent requirements

Employers will not be liable for discriminatory conduct towards employees with an existing, past or presumed disability *if* they can demonstrate that the employee cannot perform the inherent requirements of the job. The factors to be taken into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the particular role include: his/her past training, qualifications and experience relevant to the particular work; if s/he already works for the discriminator - his/her performance in working for the discriminator; and, any other factor that it is reasonable to take into account.

In addition to the inherent requirements exception, the DDA now provides that the conduct of a discriminator will *not* be unlawful *if* avoiding the discrimination would impose an unjustifiable hardship on the discriminator.

Requesting information from an employee

Employers are now expressly prohibited from requesting or requiring another person to provide information in connection with, or for the purposes of, doing an otherwise unlawful act; and, either or both of the following applies: persons who do not have the disability would not be requested or required to provide the information in circumstances that are not materially different; and, the information relates to the disability. This provision will *not* apply if evidence is produced to the effect that none of the purposes for which the person requested or required the information was the purpose of unlawfully discriminating against the other person on the ground of the disability; and the evidence is not rebutted. Employers will not be in breach of this prohibition if they require information for the purpose of determining if a prospective or current employee can perform the inherent requirements of the job or to determine what reasonable adjustments need to be made.

TIPS FOR EMPLOYERS

- The mere fact that an employee has a disability does not mean that the disability will impact on his/her ability to perform the job.
- Avoid the temptation to put ability to work issues in the 'too hard' basket—the recent amendments to the DDA reinforce the need for employers to get on the front foot in assessing whether or not a person's disability impacts on their ability to work and, if it appears to do so, in working out whether adjustments will enable the prospective or current employee to be able to meet your requirements.
- Ensure that you have a policy and procedure in place to assist line managers in determining ability to work issues and that it is implemented effectively so your staff know what to do when an issue arises.
- Ensure that you are clear about the inherent requirements for each and every job.
- Seek information from the prospective or current employee about whether adjustments would enable him/her to meet your requirements. This will usually include information from his/her treating doctor.
- Think carefully about whether or not you can make any required adjustments—if you decide you can't, be ready to prove why the adjustments would involve unjustifiable hardship.
- Understand that the management of ability at work issues is one of the more complex areas of people management/legal compliance as it requires an understanding of anti-discrimination law, industrial law, contract law, OHS law and workers compensation law. If you are not sure of what to do in this area, get in an expert and develop the internal expertise and systems of the business.

DO YOU NEED HELP in managing ability at work issues? Just give Elizabeth a call on 02 8985 7312 or send an email to elizabeth@devinelaw.com.au

KEY CASE

THE HIGH PRICE OF WORKPLACE HARASSMENT

EMPLOYER ORDERED TO PAY FORMER EMPLOYEE $466, 000 IN DAMAGES

Compared to the compensation and penalties which can be ordered in other employment law related jurisdictions (e.g. occupational health and safety, breach of contract), discrimination law has often been seen as the least costly jurisdiction by employers. However in recent years there has been a growing trend towards more substantial decisions. The recent decision of the Federal Court in *Poniatowska v Hickinbotham* [2009] FCA 680 confirms that trend; with damages of $466,000 awarded to an applicant who made a claim of sex discrimination and sexual harassment.

This case is essentially a text book example of what *not* to do when either responding to a harassment complaint or considering termination of a 'troublesome' employee, this decision is a sobering wake up call for all employers who are either reluctant to act or unsure of what to do in response to harassment complaints.

On this and the following pages we outline the background to the decision and the key findings. The employer has lodged an appeal.

Key Facts

- Ms Poniatowska was employed by Employment Services Australia (ESA), as a building consultant selling house and land packages on behalf of Hickinbotham Homes, between 3 January 2005 and February 2006.

- Ms Poniatowska's employment was terminated in February 2006 following three warnings due to "unsatisfactory performance" - the first warning was issued in November 2005 and the second and third warnings were issued in December 2005.

- Following the termination of her employment Ms Poniatowska commenced unfair dismissal proceedings, later withdrawing that action in May 2006 following an unsuccessful conciliation conference, ostensibly because she had gained new employment. She later resigned from that job due to health problems.

- In August 2006 Ms Poniatowska lodged a complaint with the Human Rights and Equal Opportunity Commission (HREOC), alleging sexual harassment, racial discrimination and sex discrimination. The bases of the complaint were a series of incidents which occurred in the first six months of Ms Poniatowska's employment by ESA:

  (1) Ms Poniatowska alleged that in April 2005 Mr A Hickinbotham commented to her in the workplace and in the presence of others, that she had "two good assets" while staring at her breasts (the **April 2005 allegation**). Ms Poniatowska did not lodge a complaint concerning this allegation during the period of her employment.

  (2) Ms Poniatowska alleged that in May 2005 Mr Mark Flynn, a sales consultant, sent her three unsolicited emails and a number of SMS text messages inviting her to have a sexual relationship with him (the **May 2005 allegation**). She reported this to her supervisor, Ms Sharrad, who allegedly responded by saying "what do you expect with a face like yours?". No action was taken in response to the complaint.

(3) Ms Poniatowska alleged that in June 2005 she was rostered to work with Mr Remo Lotito, despite her request to not work with him, and her supervisor (Ms Sharrad) said to her, in the presence of others, that: "I told Remo not to f*** my consultants" (the **June 2005 allegation**). Ms Poniatowska claimed that her subsequent complaint was inadequately investigated. It was not addressed until early August 2009, after further allegations had come to light (see below). Ms Sharrad did not dispute the allegation, saying that she had said "I have already told him (Mr Lotito) not to go f***ing my women" as a "joke". Ms Sharrad later apologised to Ms Poniatowska for the conduct.

(4) Ms Poniatowska alleged that: in June 2005 Mr Lotito sent her a coarse MMS picture message on her mobile telephone which showed a woman performing oral sex on a man and a text message "U have 2 b better"; and in June and July 2005 Mr Lotito pestered her on a number of occasions by telephone to have sex with her (the **Lotito allegations**). Ms Poniatowska did not formally complain to her employer about this conduct, but mentioned it to a colleague who reported it to Ms Sharrad.

- It soon became well known around the workplace that Mr Lotito had sent the MMS image to Ms Poniatowska, causing her embarrassment.

- Ms Sharrad reported the Lotito allegations to Mr Hickinbotham who then took steps to arrange a meeting with Mr Lotito and Ms Poniatowska. While the initial steps taken in response to the matter were prompt, the investigation then stalled. When Ms Poniatowska enquired of Ms Sharrad about the status of the investigation, Ms Sharrad said it was continuing and expressed concern for Mr Lotito and the impact of the allegations on his marriage.

- On 26 August 2005 Ms Sharrad arranged a meeting between herself, Mr Lotito and Ms Poniatowska. The purpose of the meeting was to ask Ms Poniatowska questions, which had been prepared by Mr M Hickinbotham, to elicit confirmation that the Lotito allegations had not affected Ms Poniatowska's performance, sales or her personally. Ms Sharrad was to abandon the meeting if the answers were not favourable. Once acceptable answers were provided by Ms Poniatowska, Mr Lotito was asked to apologise and he did so. He was then treated "warmly and sympathetically" by Ms Sharrad, however Ms Poniatowska was not.

- Ms Poniatowska alleged that in August 2005 Ms Sharrad asked her to enter into a sexual relationship with a man from another building company so that the Hickinbotham Group could secure a land deal with that Company (the **August 2005 allegation**).

- Ms Poniatowska alleged that in September 2005 Mr M Hickinbotham kissed her "strongly on the mouth" on the dance floor at a function being conducted by her employer (the **September 2005 allegation**).

- Ms Poniatowska also alleged that, as a result of the alleged harassment and discrimination and how ESA responded to it, she was isolated, received suggestive looks and was excluded from conversations.

- As a result of reason of the embarrassment Ms Poniatowska experienced in the workplace and the agitation caused to her by the warnings she received, Ms Poniatowska suffered symptoms of depression, insomnia, dizziness, difficulty in concentration, shortness of breath and palpitations, anxiety and some loss of motivation.

- Ms Poniatowska claimed that her work performance deteriorated due to the way in which she was treated in response to her complaints and the change of attitude from other employees. Further, she alleged that her employment was terminated in February 2006 as a consequence of the alleged conduct and that the warnings she received in the months preceding the dismissal arose either as a result of fabricating or taking advantage of deficiencies in her work performance.

- Coarse language, sometimes with sexual connotations, was "normal office banter" in the workplace.

THE HIGH PRICE OF WORKPLACE HARASSMENT

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- Ms Poniatowska was diagnosed with anxiety and depression with an adjustment disorder in 2006 by her own treating psychiatrist. A doctor appointed by the Hickinbotham Group to assess Ms Poniatowska diagnosed a major depressive disorder, but expressed concerns about her reliability as a historian. He noted that if the allegations she had made were correct, then the disorder could flow from her employment.

- ESA did not have any policy as to how to make or respond to a complaint of sexual harassment and discrimination.

- The allegations made by Ms Poniatowska were vigorously disputed by each of the respondents - the action brought before the Federal Court by Ms Poniatowska was brought against seven respondents (Mr Alan Hickinbotham, Mr Michael Hickinbotham, Mr Flynn, Ms Sharrad, Mr Lotito, Hickinbotham Homes and ESA).

Findings

His Honour. Mansfield J, found that:

- the May 2005 and Lotito allegations amounted to sexual harassment, however the June 2005 allegation did not;

- the investigation into the June 2005 allegation (involving Ms Sharrad) was unsatisfactory and may explain why Ms Poniatowska was reluctant to lodge a complaint about the Lotito allegations;

- the events the subject of the April 2005, August 2005 and September 2005 allegations either did not occur or did not occur in the form or manner alleged by Ms Poniatowska; the warnings issued to Ms Poniatowska and the termination of her employment were not due to poor performance - His Honour observed that the lack of systems (including policies and review of performance) made it hard for ESA to support its alleged concerns over Ms Poniatowska's performance; and, that there was a causal connection between the complaints of sexual harassment made by Ms Poniatowska and the eventual termination of her employment;

- since early 2006 Ms Poniatowska had suffered from an adjustment disorder with mixed anxiety and depression as a result of the unlawful discrimination of ESA;

- Ms Poniatowska had been unable to work for most of the period from September 2006 to the date of the decision and was likely to recover over a period of six months to two years.

- His Honour noted that the complaints regarding the May 2005 allegation, the June 2005 allegation and the Lotito allegations did not involve any documented investigation or any documented reprimand. This approach contrasted with the disciplinary action taken against Ms Poniatowska in relation to alleged poor performance.

- In relation to the Lotito allegations, His Honour also noted that: no real steps were made by the employer to keep the matter confidential; no formal record of the complaint was made; no support was offered to Ms Poniatowska; no notice was given to staff about the inappropriateness of the conduct, either in relation to Mr Lotito's specific conduct or in relation to workplace harassment; no warning was given to Mr Lotito; no formal record of the matter was kept; and Mr M Hickinbotham accepted Mr Lotito's version of events (that he had sent the MMS image inadvertently) without actually investigating and testing that account. Mansfield J observed at [164]:

> *"The way the Lotito allegations were dealt with, and including the way Mr Lotito himself was dealt with as a result of his conduct, contrasts with the way Ms P was dealt with in the events leading up to her suspension and termination. The contrast is dramatic.*

Moreover, I consider that the way Mr Lotito's conduct was addressed once it came to the attention of Mr M Hickinbotham and the way Ms Poniatowska was treated in that process indicates an attitude to her on the part of the Hickinbotham Group which has some relevance to my later findings about the reasons for her termination. She was clearly the victim of Mr Lotito's inappropriate conduct, but the way she was treated suggests that she was not regarded as the victim but as a problem presenter to be managed".

His Honour noted that Mr Hickinbotham's loyalty to his staff led him to not pay as much attention to Ms Poniatowska's complaints as was warranted. In his decision, Mansfield J repeatedly mentioned the combination of a "robust work environment" and lack of systems as factors which influenced the inadequate response of Ms Poniatowksa's employer to her complaints. At the conclusion of his decision, His Honour said at [361]:

"To an extent, the conduct which I have found to have contravened the Sex Discrimination Act, and consequently to have been unlawful discrimination contrary to the HREOC Act, was partly as a result of the inadequacy of systems for managing complaints of sexual harassment in the workplace on the part of ESA, and perhaps an inappropriately robust work environment".

His Honour noted that it appeared that Mr Hickinbotham did not appreciate the dangers associated with a "robust work environment".

Mansfield J decided that it was not necessary to either determine whether or not there was an implied duty of trust and confidence in the employment contract or, if it was implied, if it had been breached.

Outcome

The Court found that: the May 2005 and the Lotito allegations both amounted to sexual harassment; ESA's conduct leading to termination of employment of Ms Poniatowska amounted to sex discrimination; and, the June 2005 allegations did not amount to sexual harassment.

As a consequence of these findings, the Court awarded Ms Poniatowska **$466,000** in compensation, including $30,000 in interest: $90,000 for pain and suffering; $200,000 for past economic loss; $140,000 for future economic loss; and $3000 for future medical expenses). The orders were made against ESA.

The Court also awarded costs in favour of Ms Poniatowska.

ESA lodged an appeal against the decision. The appeal is expected to be heard in November 2009.

POSTSCRIPT

Just a few weeks after the Federal Court's decision in this matter, Ms Poniatowska pleaded guilty to 17 counts of social security fraud for the period May 2005 to May 2007 which included the period in which she was employed by ESA (January 2005 to May 2006).

"She was clearly the victim of Mr Lotito's inappropriate conduct, but the way she was treated suggests that she was not regarded as the victim but as a problem presenter to be managed"

KEY LESSONS FOR EMPLOYERS

- Take *all* complaints of discrimination and harassment seriously, if for no other reason than the risk to the bottomline that a compliance breach represents.
- Have systems in place to ensure that there is a clear, consistent and well thought out approach to responding to and investigating complaints.
- Ensure that all staff, especially managerial staff, fully understand their obligations under relevant law.
- Ensure that *all* of your employees are treated fairly and with empathy.
- Avoid contrived dismissals, they are usually easily spotted.
- Get in an expert if you don't have the internal expertise to handle/investigate complaints.
- Find out if the values of the workplace are out of step with the relevant law and putting you at risk of legal action.

Devine Law at Work

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Devine Law at Work is in the business of *helping people work together for better results.* We are a law firm and consultancy which specialises in Australian workplace law and workplace relations.

We are a multi-disciplinary practice which integrates skill and expertise in: workplace law; legal education; communication (including negotiation, conflict resolution and facilitation); workplace systems and business development.

We provide services in: legal advice; legal education; legal representation; negotiation; conflict resolution; systems development; legal health checks and workplace investigations.

We invite you to find out more about Devine Law at Work from our website **www.devinelaw.com.au**