

IRS

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NEWSLETTER

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PRESIDENT'S MESSAGE

Dear Members

The Committee of Management is again actively identifying topics of interest to the Society's members to facilitate seminars in respect of. A recent seminar on the *Return to Work Act 2015* was a great success. Keep an eye out for advertisements for future seminars.

As foreshadowed in past communications, the Society will soon be surveying members on a potential name change for the organisation to bring it into line with the peak national body, the Australian Labour and Employment Relations Association. You will receive an email and the survey will also be posted on our website.

Best wishes

Craig Stevens
President IRSSA

The Full Bench of the Fair Work Commission has provided some clarification as to the meaning of the phrase 'at work' in relation to Federal anti-bullying laws

By Kylie Dunn, Committee Member

Application to stop bullying

In [Bowker \[2014\] FWCFB 9227](#), employees of DP World Melbourne Limited made an application to the Fair Work Commission seeking an order to stop bullying under the *Fair Work Act 2009* (Cth) (**FW Act**). The alleged bullying conduct included offensive social media postings made by co-workers and union officials.

Under the FW Act, the Commission has jurisdiction to make a stop bullying order if a worker has been bullied at work.

The employer and the union objected to the application on the basis that the social media material was posted outside of working hours and therefore the alleged bullying conduct did not occur 'at work'.

Findings of the Commission

The Commission, acknowledging that the use of social media to engage in bullying behaviour creates particular challenges, clarified that:

- being 'at work' is not limited to the confines of a physical workplace;
- a worker will be 'at work' at any time when they are performing work, regardless of their location or the time of day;
- a worker may be 'at work' even when not actually performing work, such as during authorised meal breaks or whilst doing any other activity which is authorised or permitted by the employer (such as accessing social media);
- there is no requirement for the person responsible for 'bullying' posts to be at work when the posts are made;
- nor is it necessary for the worker to be 'at work' when the comments are posted; rather, it will suffice if the worker accesses the posts later whilst 'at work'.

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

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Implications

This case provides some helpful guidance with respect to the circumstances in which inappropriate social media usage will fall within, or outside, the scope of the Commission's anti-bullying jurisdiction.

Employers should have in place comprehensive anti-bullying and social media policies that make clear that bullying behaviour is unlawful and will not be tolerated either in the workplace or outside the workplace.

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A recent Full Federal Court decision highlights the serious consequences of not taking appropriate steps to prevent sexual harassment in the workplace and the trend towards higher damages awards

By Kylie Dunn, Committee Member

The decision of the Full Court of the Federal Court of Australia in [Richardson v Oracle Corporation Australia Pty Ltd \[2014\] FCAFC 82](#) serves as a timely reminder:

- of the increasingly serious consequences of failing to take adequate precautions to prevent sexual harassment;
- that employers can be liable for damages for loss of enjoyment of life, psychological injury and economic loss; and
- of the importance of employers being able to demonstrate that they have taken all reasonable steps to prevent sexual harassment including:
 - ensuring that the organisation has an up to date sexual harassment policy which has been communicated to all employees;
 - providing training to employees on what is, and is not, appropriate behaviour in the workplace;
 - ensuring that a thorough investigation procedure is in place and is followed;
 - ensuring that proper remedial action is taken; and
 - taking steps to ensure that complainants are not exposed to continuing contact with an alleged offender during an investigation period.

In this case the Full Federal Court increased an award of damages from \$18,000 to \$130,000 to a former employee who brought a claim against her former employer in relation to alleged sexual harassment by a co-worker. The new award of damages took into account the employee's economic loss, psychological injury including anxiety and depression, and deteriorated sexual relationship with her partner.

Facts

The employee, Ms Richardson, made allegations of sexual harassment against a co-worker, Mr Tucker. She claimed to have been subjected to humiliating slurs and sexual advances on 11 separate occasions over a two month period when working alone with Mr Tucker as well as in front of other colleagues. Ms Richardson reported the harassment to her direct manager and an investigation was conducted by her employer, Oracle Corporation Australia Pty Ltd (**Oracle**). Ms Richardson also made a formal written complaint about Mr Tucker's behaviour.

Continues over

During the investigation process, Mr Tucker continued to attend work and he and Ms Richardson continued to have indirect regular contact through conference calls and emails. The investigation found that Ms Richardson's complaints were substantiated. Mr Tucker made a written apology to Ms Richardson which stated that his conduct was only intended as 'light-hearted banter'. Oracle also gave Mr Tucker a first and final warning.

Ms Richardson resigned from her employment with Oracle a few months later and was offered employment by EMC Australia (**EMC**).

Ms Richardson brought a claim in the Federal Court against both Oracle and Mr Tucker alleging that Oracle should be vicariously liable for Mr Tucker's unlawful conduct. She also criticised the investigation carried out by Oracle, including the fact that:

- Oracle required her to work with Mr Tucker whilst the investigation continued;
- Oracle restricted her from discussing the complaint with colleagues; and
- Oracle's action in sending Mr Tucker's apology to Ms Richardson caused further distress to Ms Richardson when she read the apology.

Ms Richardson sought damages for psychological and physical injury caused by stress resulting from the sexual harassment that led her to resign, as well as for economic loss on the basis that her new employment with EMC was lower paid.

Decisions of the Federal Court

Judge Buchanan accepted that Mr Tucker had engaged in unlawful sexual harassment in contravention of the *Sex Discrimination Act 1984* (Cth). The trial judge found that Oracle was vicariously liable for Mr Tucker's conduct because it was unable to show that it took all reasonable steps to prevent Mr Tucker from sexually harassing Ms Richardson.

The Full Court, in increasing the damages award:

- found that the original award of damages of \$18,000 was "manifestly inadequate" and out of step with the general standards prevailing in the community. The Court awarded Ms Richardson the sum of \$100,000 for pain and suffering, which included compensation for deterioration in her sexual relationship; and
- awarded damages for economic loss of \$30,000 equivalent to the difference between her Oracle income and her EMC income. The Court found that Mr Tucker's unlawful conduct was a material cause of Ms Richardson's decision to resign from her employment.

Oracle was also ordered to pay Ms Richardson's costs of the appeal.