

RAINEY COLLINS LAWYERS

Employers' Guide to Dealing with Sexual Harassment in the Workplace

If you receive a complaint of sexual harassment from an employee it is vitally important that this be properly investigated. You are at risk of being sued by the complainant employee or alleged harasser (or even both) if this is not investigated properly!

In a recent case an employee was awarded \$17,500 because a manager failed to deal properly with her complaints of pornography in the workplace.

Investigation

If you receive a complaint from an employee that he or she has been sexually harassed by a co-worker, you must conduct a full investigation of all the relevant facts. Failure to do so means the complainant employee automatically has a personal grievance against you.

Because of the sensitive nature of an allegation of sexual harassment, you should be careful to keep the investigation as confidential as possible.

If you have the power to suspend in the employment agreement then you need to advise the alleged harasser that you are considering suspension and seek their input before you make the decision to suspend or not.

The alleged harasser should be given written notice to attend a disciplinary meeting at a set time and place.

The notice should set out what is alleged, refer to relevant clauses and the ability to bring a support person.

Set out the consequences if the allegation is proved. For a minor matter the likely consequences will be a warning. If a more serious issue could lead, if proved, to dismissal, then the notice should state that.

It is vitally important to state that the matters are only an allegation and you should not indicate that any conclusions have been reached about the behaviour.

At the formal disciplinary meeting you should explain that it is a disciplinary meeting to investigate their alleged conduct and should set out the allegations.

You should ask the alleged harasser whether they accept or deny the allegations and whether they wish to give any explanation. Give them an opportunity to do so.

Once you have heard their explanation, denial or acceptance you should advise them that you will consider that before deciding on whether the allegation is correct and if it is what action may be taken.

Tell the alleged harasser that you will notify them of the decision. At this point you should conclude their involvement in the meeting.

You can then go on to consider whether you are satisfied with any explanation that has been given.

You should decide whether you need to make further enquiries into matters raised.

Determination

After you have investigated any other matters and considered the explanation given by the alleged harasser, you should decide whether the complainant employee was sexual harassed.

Sexual harassment is, generally, an inappropriate request for sexual favours and unwelcome or offensive behaviour of a sexual nature. There are three requirements for the behaviour to be considered sexual harassment:

- The conduct must be of a sexual nature;
- The behaviour must have been unwelcome or offensive to the complainant. It is important to remember that it does not matter if you yourself would not have found the behaviour unwelcome or offensive;
- The behaviour must have had a detrimental effect of the complainant's job, or job performance or job satisfaction.

Action

If you conclude that sexual harassment has occurred, then you must take whatever steps are practicable to prevent repetition of that behaviour. This may, for example, involve restricting the access of the alleged harasser to certain parts of the workplace and/or disciplinary action against the alleged harasser.

It would be sensible to involve the complainant in the process so they can express any views as to the appropriateness of the steps taken.

If you could not determine whether sexual harassment occurred, it would be wise to clearly outline the sort of behaviour that is acceptable/not acceptable at the workplace.

Disciplinary Action Against The Alleged Harasser

If, as a result of an investigation into an allegation of sexual harassment, you decide to take disciplinary action against the alleged harasser then you need to decide what is appropriate in the circumstances.

What is appropriate disciplinary action will depend on the particular facts of the case. While you have an obligation to protect an employee by taking steps to prevent the repetition of sexual harassment, you still have an obligation to act fairly in relation to the alleged harasser.

The decision you make must be confirmed in writing to the alleged harasser and a copy put on their file.

If you issue a warning you should advise that if there is another lapse, further disciplinary action may be taken, which could put their employment at risk.

If you have previously given a warning for similar behaviour and the employee appears to be in breach of it then you need to repeat the steps above but you need to advise the employee that the potential outcomes will be at a more serious level.

The level depends on the circumstances and could be a written warning, a final warning or a dismissal.

In a very serious case, dismissal without warning may be appropriate. This should only ever occur after a proper investigation.

If, at some point in the future, the complainant is again sexually harassed by a co-worker then they automatically have a personal grievance against you if you failed to take practicable steps to prevent repetition of the behaviour. This emphasises the need to take appropriate action if you receive a complaint of sexual harassment, while ensuring any disciplinary action you take is done in accordance with the procedures outlined above.

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