

# Avoid being sued - basic employee management

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14 October 2010

# Number 1

Sacking an ill or injured worker

# Sacking an ill or injured worker

- Offence to dismiss employee within 12 months of WorkCover injury
- Unlawful to dismiss based on 'temporary absence' from work due to illness/injury
- Meaning of temporary absence
  - ▶ where the total period of unpaid absence within a 12 month period is more than three months
  - ▶ remember the effect of 'paid sick leave'

# Exposures

- Exposure of Councils
  - ▶ unfair dismissal claim under *Industrial Relations Act 1999* (Qld)
  - ▶ discrimination claim (disability) under
    - *Anti-Discrimination Act 1991* (Qld)
    - *Disability Discrimination Act 1992* (Cth)
- Individuals can also be personally exposed to a discrimination claim

# What to do

- Be aware of the risks – get HR advice
- Establish a policy
- Try to accommodate injured employees and facilitate return to work
- Identify inherent requirements
- Determine if services/facilities (that do not cause unjustifiable hardship) allow inherent requirements to be performed

# Sacking an ill or injured worker

- *AWU v Lockyer Valley Regional Council*
- *Forbes v Brisbane City Council T/A Brisbane Transport*

# General overview

- Five key points
    - ▶ cannot dismiss for 'temporary absence because of illness or injury' or because of a physical or mental disability or impairment
    - ▶ can dismiss if there is a valid reason AND procedural fairness is followed
    - ▶ medical evidence (if required) must be credible and current
    - ▶ must accurately identify 'inherent requirements' of the job
    - ▶ must apply performance management principles
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# Number 2

Not managing workplace bullying

# Anti-bullying obligations/exposure

- *Prevention of Workplace Harassment Code of Practice 2004*
- *Workers' Compensation and Rehabilitation Act 2003 (Qld)*



# Workplace bullying is

- Repeated less favourable treatment of a person in the workplace
- Unwelcome & unsolicited
- Intimidates, offends or humiliates a person
- Can occur between people of any gender and any position in the workplace



# Workplace bullying is NOT

- Single or one-off instances
- Reasonable management action e.g. performance management processes, counselling, disciplinary action, etc
- A legitimate change in terms and conditions of employment



# Why prevent bullying

- Reduced productivity and efficiency
- Absenteeism
- Lowered morale
- Turnover
- Poor public image
- Stress complaints
- (Legal) costs in addressing behaviours



# Management responsibility

- Train staff on requirements and complaint procedures
- Act as a role model
- Take all complaints seriously
- Assist in and manage complaint procedures



# Turning a blind eye

- You can be prosecuted under occupational health and safety laws if you
  - ▶ engage in inappropriate behaviour
  - ▶ condone it by ignoring inappropriate actions of employees
- You may also be subject to disciplinary action



# Turning a blind eye

- Managers can be held responsible
  - ▶ *Inspector Maddaford v MA Coleman Joinery (NSW) Pty Ltd, Brian Coleman & Graham Coleman*
  - ▶ *Café Vamp*

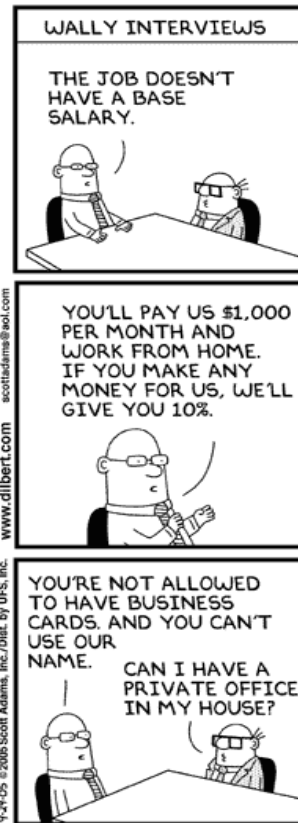
# Changing landscape

- Claims outside of 'traditional' avenues
  - ▶ breach of express or implied contractual terms (e.g. provide a safe workplace/safe system of work)
  - ▶ breach of 'fair trading' legislation – misleading and deceptive representations about the work environment
  - ▶ claims in equity or tort (trespass to person)
  - ▶ criminal prosecution – assault, criminal negligence

## Number 3

Not managing contractor/employee distinctions

# Not managing contractor/employee distinctions



# Not managing contractor/employee distinctions

- Contracts should reflect reality
- Courts will look behind labels attributed by the parties
- Possible exposure to claims for unfair dismissal, employee entitlements, unpaid tax, failure to have adequate insurance
- Case example - *Damevski v Giudice & Ors*

# Number 4

Create bad policies

# Create bad policies



# Create bad policies

- Good policies can reduce legal exposure
- Review policies and procedures to ensure that they
  - ▶ are adequate
  - ▶ are relevant
  - ▶ reflect current law
- Policies should be clear and provide relevant examples

# Create bad policies

- Go no further than necessary to protect legitimate interests
- Draft carefully - policies can form part of employment contract
  - ▶ *Goldman Sachs JB Were Services Pty Limited v Nikolich*
  - ▶ HR policy: maintain a safe and healthy workplace
- Difficult to rely on badly implemented policy to justify dismissal

# Create bad policies

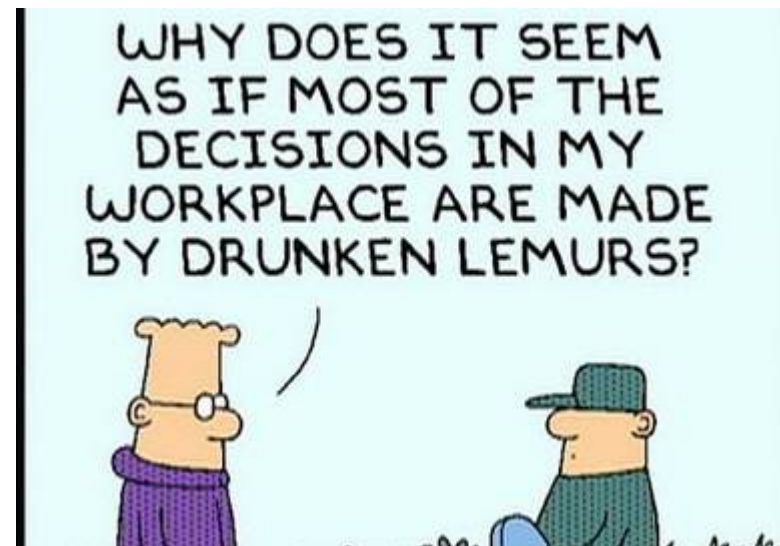
- *Banjo v Kowanyama Aboriginal Council*
- *Riverwood International Australia Pty Limited v McCormick*

# Number 5

Let good policy go bad

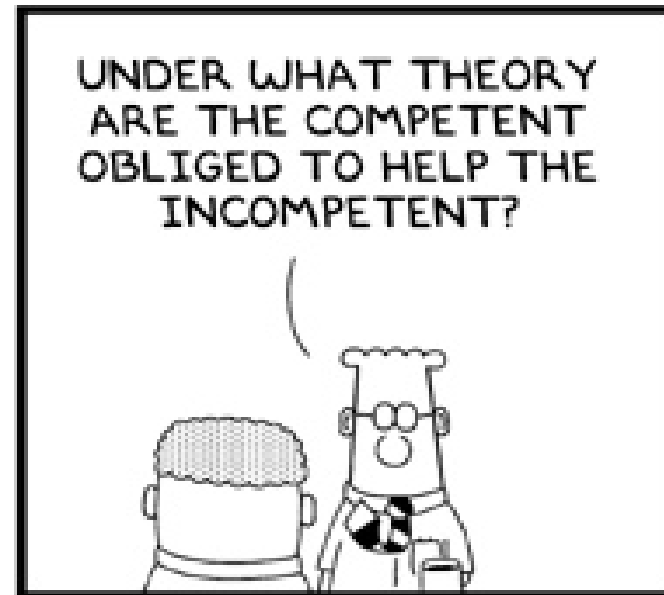
# Let good policy go bad

- Ensure compliance with policies
- Provide ongoing training to management and employees
- Failure to do this may exacerbate sanctions or result in procedural unfairness



# Let good policy go bad

- *James Charles Debono v TransAdelaide*
- *WorkCover Authority of New South Wales (Inspector Dunn) v Pacific Dunlop Limited t/as Improdex*



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