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David Jones and discrimination: What is the wash-up?

Now that the David Jones/McInnes/Fraser-Kirk discrimination dispute has come to an end, and the media has to find salacious news elsewhere, it is time to consider the overall significance of the David Jones case.

Firstly, it is significant that, while the much disputed $37m claim appears to have been settled for a much smaller amount, the reported settlement of about $850,000 still amounts to a record amount of compensation in a discrimination claim, at least as far as the public record goes. The previous record was $466,000 in a matter that went all the way through the court process and involved an employee with demonstrable psychological injury.

Obviously, the high profile of the alleged offender and the employer, and the amount of media attention this generated, played a significant part in this outcome. From a commercial point of view, protracted difficult litigation would have carried substantial costs and risks, not least the ongoing reputational risk for David Jones. Most claimants and employers will not be in such an exposed position.

Secondly, though, the case prompted an extended public conversation about what conduct is inappropriate and when, and what consequences should flow from such conduct. The result is that the awareness of potential complainants has been substantially heightened, and as a result, so has the priority senior employees, and their employers, must place on avoiding "conduct unbecoming". Put simply, employees, and especially senior employees must not place themselves in a position where it can be alleged that conduct, which could be seen as friendly in some contexts, took on a sexual aspect, or where it may be interpreted that way (even if the employee himself or herself does not see it that that way). And employers cannot turn a blind eye to conduct of this kind.

Thirdly, it made manifest to all that it is insufficient to avoid liability, or the risk of liability, to have policies and procedures (including a "hotline" for staff who felt that they had been harassed or discriminated against) if a particular instance shows that these policies were not actively enforced, or if conduct infringing those policies and procedures is condoned or ignored.

The vicarious liability of employers is predicated on not having taken all reasonable steps to prevent harassment or discrimination by other employees. This is a high standard for employers to meet, but the best way to demonstrate the taking of reasonable steps is to have evidence of enforcement. It will often be challenging to have a "difficult conversation" with an employee who is stepping over the line (and a clear example of this is the sensitivity of telling a star such as McInnes that his conduct appeared to be unbecoming), but the conversation should not really be that "difficult" if the employer is serious about enforcing policies and protecting staff from harassing behaviour. Turning a blind eye is not an option.

Fourthly, the stories which emerged around the central allegations both from David Jones and from elsewhere suggested that a lot more harassing behaviour goes unreported and uncomplained of, in highly reputable businesses, than the uninformed might think. Yes, it could be your business.

In short, the David Jones experience has raised the bar for everyone. What can you do to bring your business up to the bar? Have you taken "all reasonable steps"? Ask whether your policies are full and sufficient, whether they have been reviewed recently, whether there has ever been training in relation to those policies, and whether that training has been refreshed within the last couple of years.

If the answer to any of those questions is "no", you should contact Stephen Booth, Anna Ford, or Enza Iannella for advice and assistance in ensuring your business is up to speed. We can also assist you with punchy and to-the-point in-house training.

For Further Information

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