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Rise predicted for workplace claims amid move to COVID-normal

By Melanie Burgess

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As workplaces settle into new COVID-normal models, employers and employees could face more legal battles.

Claims of discrimination, bullying, underpayment and unfair dismissal could be set to spike, as workplaces settle into new COVID-normal working models.

Experts suggest employers and employees take steps now to ensure they are not caught out. Here is where the issues may arise:

PUSHING STAFF TO RETURN TO THE WORKPLACE

Maureen Kyne & Associates managing director and workplace expert Maureen Kyne predicts issues if employees accustomed to working from home are pressured to return to the workplace.

“There is legislation saying people can choose to work from home so I (expect) some discrimination claims,” she says.

“If the employer or manager or leader of the team then starts to send out emails and text messages and phone calls harassing them saying ‘I want you here’, and if that’s done on a repeated basis, there will be bullying claims as well.”

Andersons Solicitors special counsel and industrial lawyer Margaret Kaukas acknowledges a possible increase in such claims but says they may not succeed.

“Unless the employer behaves inappropriately when communicating with the worker, it is unlikely that a requirement to return to work in the workplace would, of itself, satisfy the legal definition of ‘bullying’,” she says.

“Similarly, unless the worker has a legal right to work from home or there is a particular risk for the worker in returning to work in the workplace, it is unlikely — in the absence of agreement by their employer they can work from home — they could legally resist a direction to return to work at the workplace.”

FAVOURING ONSITE STAFF OVER REMOTE EMPLOYEES

Kaukas says there is a genuine risk people working from home might miss opportunities or be selected for redundancy because they are less visible to management, however this does not necessarily constitute unlawful discrimination.

“The law only prohibits discrimination on the grounds of certain specific ‘protected characteristics’ (such as) sex, race, religion, age, disability, sexual preference, pregnancy, or family responsibilities,” she says.

“It is not unlawful to discriminate against someone on the grounds they are working from home unless (it) can be linked to one of the ‘protected characteristics’.

“However, exclusion from communications or activities which other staff are involved in, or applying rules or conditions unequally to employees have, in the past, been found to amount to bullying as legally defined and could lead to psychological injury.”

King Kong founder Sabri Suby says this is not an issue at his digital marketing agency as he has a “radically transparent” leadership style. His 65-plus staff get a company update each week, with a “waterhole meeting” presented in person and via video recording to ensure all staff are equally involved.

“We go through all the numbers, how much money we made, some wins, and I keep everyone abreast of what’s happening in the company,” he says. “It’s making sure the communication isn’t siloed and you are still transparent and everyone is rowing in the same direction.”

EXPECTING UNFAIRLY HIGH PERFORMANCE

Kaukas says an issue she has observed since the pandemic is employees’ performance being judged by applying normal standards when circumstances were anything but normal.

“(For example, a) client was dismissed for failing to meet work goals shortly after her hours and pay were cut by 20 per cent, while staff were specifically instructed to maintain the same level of service to the employer’s customers,” she says. That dismissal was ruled unfair.

NOT PAYING OVERTIME TO REMOTE EMPLOYEES

Workforce management software company Nimbus founder and chief executive Grant Custance expects underpayment claims will also surface in the wake of the pandemic.

“I think there is a potential risk for employers when employees are working from home and it’s not properly documented what hours they are logging,” he says.

“If you don’t have a system like ours, a person can finish late every night and three years later say ‘you haven’t paid me for all this overtime I was working’. Whereas, if you document the hours and make sure they work the hours they are meant to and enforce that ... there is no discussion.

“(With Nimbus), an alert will come up to a line manager that says ‘this person is going to work longer’, so the line manager can contact the employee to say ‘would you like an extended shift? Here are the terms of the extended shift’ and that’s all through the app.”