

How WorkSafe applies
the law in relation to

Discrimination on health and safety grounds

A Guideline made under section 12 of the
Occupational Health and Safety Act 2004

WorkSafe Position
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What this WorkSafe Position is about

This document sets out WorkSafe's position on the meaning of the terms 'injures an employee in the employment of the employer'; 'alters the position of an employee to the employee's detriment'; and 'dominant reason' in the context of duty holders meeting their obligations under Part 7 (sections 76 to 78) of the *Occupational Health and Safety Act 2004* (OHS Act).

Section 76 of the OHS Act prohibits discrimination by an employer against an employee or prospective employee on grounds that relate to health and safety.

Section 76(1) applies to:

- an employer who dismisses, injures in employment or alters the position of an employee to the employee's detriment or who threatens to do such things, and
- an employer who refuses or fails to offer employment to a prospective employee or treats a prospective employee less favourably than another prospective employee would be treated in an offer of employment, on the basis that under s76(2) the person:
 - a) is or has been a health and safety representative (HSR) or a member of a health and safety committee (HSC),
 - b) exercises or has exercised a power as an HSR or as a member of an HSC,
 - c) assists or has assisted, or gives or has given any information to, an inspector, an HSR or a member of an HSC, or
 - d) raises or has raised an issue or concern about health or safety to the employer, an inspector, an HSR, a member of an HSC or an employee of the employer.

The *Occupational Health and Safety Amendment (Employee Protection) Act 2009* which took effect on July 1 2009 also prohibits discrimination by an employer against an employee, or prospective employee, on the basis that the person has assisted, given information to or raised safety issues or concerns with authorised representatives of registered employee organisations (ARREOs).

Under s77 an employer bears the onus of proving that the reason for the alleged discriminatory act(s) was not the dominant reason for the employer's conduct.

What does this WorkSafe Position apply to?

This Position applies to alleged cases of discrimination that are referred to WorkSafe or where WorkSafe initiates an investigation and possible prosecution. These matters are subject to criminal prosecution under the OHS Act.

This Position does not apply to cases of alleged discrimination that individual employees may take to the Industrial Division of the Magistrates' Court seeking civil remedies under the *Occupational Health and Safety Amendment (Employee Protection) Act 2009*.

Who does this WorkSafe Position apply to?

Any employer or prospective employer who has duties to ensure health and safety under Part 3 of the OHS Act.

Date

This WorkSafe Position was made on December 31 2009.

What does 'injuring in employment' and 'detriment' mean?

What amounts to an employer 'injuring an employee in the employment of the employer' or 'altering the position of an employee to the employee's detriment' or threatening to do such things?

In considering these questions an objective assessment of all the facts is required.

'Injuring an employee in the employment of the employer' usually relates to the loss or alteration of a legal right in employment, while 'altering the position of an employee to the employee's detriment' may include any adverse effect on or deterioration in the employee's conditions.

Some possible examples of injuring or altering the conditions of employment to the employee's detriment or threatening to do so, may include:

- demotion
- allocation of work below skill/classification level (leading to a reduction in classification or employability)
- less flexible work hours, less congenial shifts or rosters, less overtime or less prospect of overtime earnings
- repeated changes to shifts, rosters or working hours
- lower salary, increments or bonuses
- reduction in allowances
- restrictions in maintaining competency levels
- fewer training opportunities
- refusing promotion or advancement
- job transfer
- standing down on full pay and being singled out for this purpose
- denial of wage increase and being singled out for this purpose
- reneging on an agreement to pay a wage increase
- withdrawing a promise of secure employment in a position for an agreed term or an offer of promotion or advancement
- denying access to existing resources such as information technology
- verbal abuse, humiliation, denigration or ridicule
- isolation or exclusion from organisational activities
- denying access to a fair process before taking disciplinary action
- taking disciplinary action
- counselling and issuing a warning letter where the effect is to make the job less secure, or
- making redundancies on the basis of discriminatory reasons.

Depending on the circumstances of each case, some of the actions specified in this section may be legitimate for operational and/or procedural reasons.

What does 'dominant reason' mean?

Section 76 of the OHS Act prohibits conduct by an employer that is listed in s76(1) if the dominant reason for engaging in that conduct is one of the reasons listed in s76(2).

The High Court has said 'dominant' means 'ruling, prevailing or most influential'.

The dominant reason for an employer's action will be objectively assessed based on all available and relevant information.

The 'dominant reason' for an employer's action may not be the reason stated by an employer or other person, and may not be the reason apparent at first glance. One or more reasons may be provided by an employer as to why they engaged in the alleged conduct.

When investigating what the dominant reason was for an employer's conduct in a s76 matter, WorkSafe will consider whether the employer would have acted as they did if the employee or prospective employee had not:

- been an HSR or member of an HSC
- exercised their rights as an HSR, or
- raised an OHS issue or any other circumstance covered under s76(2).

Note: under s77 of the OHS Act, if the matter goes to court, the defendant (ie the employer/prospective employer) bears the onus of proving the reason alleged in the charge was not the dominant reason why they engaged in the conduct.

Explanation

The case law that WorkSafe has taken into account in formulating this Position includes:

Finance Sector Union of Australia v Australia & New Zealand Banking Group Limited (2002) 120 FCR 107, para [139]; Childs v Metropolitan Transport Trust (1981) 29 AILR 24, cited in Commonwealth Bank of Australia and Anor v Finance Sector Union of Australia (2007) 157 FCR 329 at para [71]

Childs v Metropolitan Transport Trust (1981) 29 AILR 24, cited in Commonwealth Bank of Australia and Anor v Finance Sector Union of Australia (2007) 157 FCR 329 at para [72]

Independent Education Union of Australia v Canonical Administrators, Barkly Street Bendigo & Ors (1998) 87 FCR 49 at 68; Maritime Union of Australia v Geraldton Port Authority (1999) 93 FCR 34 at 77

Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1

Squires v Flight Stewards Assn of Australia (1982) 2 IR 155 at 64

Health Services Union of Australia v Tasmania (1996) 73 IR 140 at 145

Health Services Union of Australia v Tasmania (1996) 73 IR 140 at 145, applying Linehan v Northwest Exports Pty Ltd (1981) 57 FLR 49 at 62

Childs v Metropolitan Transport Trust (1981) 29 AILR 24, cited in Maritime Union of Australia v Geraldton Port Authority (1999) 93 FCR 34 at 70

Kimpton v Minister for Education (Vic) (1996) 65 IR 317 at 319

Construction, Forestry, Mining and Engineering Union v Coal and Allied Operations Pty Ltd (1999) 140 IR 131, per Branson J at para 95

Community and Public Sector Union v Telstra Corporation (2001) 107 FCR 93 paras 15 - 16

Greater Dandenong City Council v Australian Municipal Clerical and Services Union (2001) 112 FCR 232 at para 89

Roberts v General Motors Holden Employee Canteen Society Inc (1975) 25 FLR 415 at 419

Federal Commissioner of Taxation v Spotless Services Ltd, Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ (1996) 186 CLR 404 at 416.

Effect of this WorkSafe Position

Under s15 of the OHS Act, this WorkSafe Position does not give rise to any liability of, or claim against, WorkSafe Victoria. It does not give rise to any right, expectation, duty or obligation that a person may not otherwise have. It does not give rise to any defence that would not otherwise be available to a person.

WorkSafe Victoria will not act inconsistently with this document. WorkSafe Victoria's actions in relation to this document do not affect the operation of the OHS Act or the Regulations made under the OHS Act.

Glossary

ARREOs means authorised representatives of registered employee organisations who have the right to enter workplaces to enquire into suspected breaches of the OHS Act provided they meet legislative requirements under Part 8 of the OHS Act to do so.

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