



TRANSPORT WORKERS UNION OF AUSTRALIA
VICTORIAN/TASMANIAN BRANCH
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Tasmania and Victorian Country
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OHS GUIDANCE NOTE - No. 12

“DISCRIMINATION”

Jan 2009

Dealing with allegations of discrimination related to health and safety

TWU & WorkSafe Victoria have a protocol for dealing with allegations of discrimination by an employer against an employee under section 76 of the *Occupational Health and Safety Act 2004*. The protocol is set out below.

What is discrimination under the OHS Act?

Alleged discrimination under s76 of the *Occupational Health and Safety Act 2004* (OHS Act) is one of WorkSafe Victoria's priorities for comprehensive investigation, with a view to potential prosecution or an enforceable undertaking.

Section 76 of the OHS Act prohibits discrimination by an employer against an employee, or prospective employee, on the basis that the person:

- is or has been a health and safety representative (HSR) or a member of a health and safety committee (HSC); or
- exercises or has exercised a power as an HSR or as a member of an HSC; or
- assists or has assisted or given information to an inspector, HSR or a member of an HSC; or
- raises or has raised an issue or concern about health or safety to the employer, an inspector, an HSR or a member of an HSC or an employee of the employer.

Discrimination may include dismissing, injuring, or altering the position of an employee to their detriment or threatening to do any of these things, or refusing or failing to offer employment to a prospective employee or treating the prospective employee less favourably than another prospective employee would be treated in terms of offering employment.

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

What do I do if I believe I have been discriminated against?

- Contact your HSR immediately.
- If you do not have an HSR, contact your TWU official (ARREO) Mobile or 1300-727614

- If you cannot contact your TWU Official, contact the TWU Health & Safety Representative Support Officer(HSRSO) Mobile or 1300-727614
- Also contact WorkSafe's Advisory Service 1800-136089

NOTE: During this process keep all documentation and note names, dates & times if possible. This will assist with in processing the allegation.

What happens when WorkSafe receives an allegation of discrimination?

WorkSafe has a protocol for dealing with allegations of discrimination in a prompt, consistent and effective manner. Where an allegation of discrimination has been made related to OHS, the matter will be directly referred by WorkSafe's Advisory Service to the inspectorate for consideration and appropriate action.

Preliminary enquiries by inspectors

An inspector and his/her group leader will conduct preliminary enquiries about any allegations of discrimination. An inspector or group leader will make initial contact with the caller within one day and conduct the first interview with that person or visit the workplace (as appropriate to the circumstances) within three working days of the service request being received by the inspectorate.

Enquiries and evidence gathering by the inspector are aimed to establish whether or not:

The complainant is/was an employee or prospective employee who:

- is/was an HSR
- is/was a member of an HSC
- is exercising/has exercised a power as an HSR or member of an HSC
- is assisting/has assisted or is giving/has given information to an inspector, an HSR, or a member of an HSC; or
- is raising/has raised an issue or concern about health and safety to an inspector, an HSR, or a member of an HSC, or an employee of the employer.

The complainant was subject to:

- dismissal (or threat of same)
- injury in employment (or threat of same)
- altering the position (to the employee's detriment)
- refusing/failing to offer employment to (or threatening to) a prospective employee, or
- less favourable treatment to a prospective employee.

The person committing the alleged discriminatory action is the employer or a prospective employer of the complainant (and not, for example, a third party such as a principal contractor or host employer if the complainant's employer is a contractor or labour hire firm), and

The dominant reason for the conduct alleged to be discriminatory, was any of the circumstances above.

Case conferences

Once preliminary enquiries are complete, a case conference will be held by WorkSafe involving a panel comprised of the relevant inspector, group leader, and representatives from other areas of WorkSafe including Operations Support, Legal Services and Workplace Support and Education.

The case conference helps to determine, on a case by case basis, whether there is sufficient information to form an opinion that discrimination has occurred and, if so, the options for dealing with the particular matter.

Possible outcomes

Outcomes of the process may include one or more of the following and, as far as possible, aim to preserve or restore the status quo for the person who has been subject to alleged discrimination:

- the inspector may advise the employer that there has been a contravention and what compliance looks like, and seek voluntary compliance
- WorkSafe or an inspector may issue an Improvement Notice
- a comprehensive investigation may be commenced with a view to potential prosecution or an enforceable undertaking
- a strategy is determined for managing the intervention post case conference
- if the allegation is not deemed to be a matter involving discrimination, consideration will be given to whether any further action should be taken.

If during the case conference process the panel forms the view that bullying rather than discrimination may have occurred, a strategy will be determined for dealing with that matter according to WorkSafe's procedure for dealing with allegations of bullying in the workplace.

Disputed PIN

Where an HSR issues a Provisional Improvement Notice (PIN) that raises an allegation of discrimination and the PIN is disputed, WorkSafe inspectors will deal with the matter by following WorkSafe's procedure for dealing with disputed PINs as well as this procedure to establish whether there is a contravention of s76 that can be supported.

Keeping parties informed

Both the complainant and the employer will be kept informed of the progress and the outcomes of WorkSafe's enquiries into any allegation of discrimination that has been made in relation to their workplace.

The TWU Vic/Tas Branch (OH&S section) formulated this code with extracts from Worksafe Victoria's policy's. It is offered as a broad guide to assist with members. Further information regarding "Consultation and Employees obligations" in the workplace is available for Members who can contact the *TWU Health and Safety Section* or the TWU Member Assist Officer for a copy the Union's Policy.

Contact us on -

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