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a regular newsletter for clients of
mcphail gibson & zwart ltd

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Diversity is a term that is being used more widely than ever before. In the media the term is used in the context of schools, workplaces, government, sport, and on Boards. In 2017, New Zealand Rugby committed to “*eliminating homophobia and discrimination from rugby and ensuring diversity and inclusion*”. Yet, in 2020 New Zealand film director Taika Waititi commented that he felt New Zealand was “*going backwards*” in terms of diversity.

So what does diversity mean in an employment context? Is diversity just about race and gender, or does it go beyond this? Do employers really have to have a diverse workforce? And how is having an inclusive workforce different to having a diverse one?

Diversity

Diversity, according to its dictionary definition, simply means variety or a range of different things. So far as the term applies to people, many countries, including New Zealand, have attempted to prescribe the range of points of difference or diversities which should be upheld and protected by law. In New Zealand diversity is protected through legislation such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

The latter Act aims to prevent unlawful discrimination against persons on a variety of protected grounds (diversities). Those grounds are sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation. Other legislation which promotes diversity in employment includes the Employment Relations Act 2000, the Equal Pay Act 1972 (including amendments made under the Equal Pay Amendment Act 2020 around pay equity), and the Parental Leave and Employment Protection Act 1987.

Some organisations believe that a wider range of diversities should be given protection by legislation: advocates for transgender rights argue that gender identity should specifically be listed as a prohibited ground of discrimination under the Human Rights Act 1993 and that transgender people may not be adequately protected by the term “sex”.

Some neurodiversity advocates (neurodiversity includes ADHD, Autism, Dyslexia, Dyspraxia, Dyscalculia, Dysgraphia, Sensory Processing Disorder, Tourette’s etc) argue that neurodivergent people do not have disabilities, but simply think in a different way. Yet the neurodivergent community is a particularly vulnerable sector of the workforce and as such some advocates argue that they nonetheless require specific protections from discrimination through legislation.

Why have a diverse workforce?

While the above legislation aims to protect individuals from discrimination on a protected ground (or diversity), the law does not go so far as to *require* diversity in employment. However, from a legal perspective there may be reasons an employer would want to embrace diversity:

- Not having a diverse workforce could potentially be used as evidence of discrimination or indirect discrimination, if an unsuccessful job applicant were to bring a claim that they had been turned down due to their age/gender/ethnicity/disability etc.

*“Diversity is the mix.
Inclusion is making the
mix work” ~Andres Tapia*

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor or David Appleton.**

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- The prospect of an event occurring, which then leads to a discrimination or harassment claim, may be higher where a workforce is not used to working with someone who is different to the majority.
- If you do have a discrimination claim brought against your organisation, robust diversity policies and practices may, depending on the circumstances, be used as evidence to show that all reasonably practicable steps were taken to prevent the employee from harm and/or that accommodations were made to support the employee in their employment.
- Diversity can't be avoided altogether. Sometimes employees are hired and later it is found that they have undiagnosed disabilities (such as ADHD or dyslexia) or develop disabilities such as addiction or depression. Equally, a member of staff who outwardly appears male, may decide to transition towards a female identity. An employee who appears to belong to one ethnicity may in fact belong to another.

Inclusion

Whether you actively promote and encourage diversity in your workforce or whether diversity happens on its own, simply having a variety of employees may not be enough, unless all employees are genuinely included as valuable participants in the workplace. While "*lack of inclusion*" is not a legal claim in itself, the risk of not practising inclusion is that you could be faced with a discrimination claim.

If you do have a diverse workforce, in many situations inclusion may require you to take active steps (reasonable accommodations) to allow everyone to work from an even platform, while celebrating what makes the employee unique. For example, reasonable accommodations might include:

- allowing someone with ADHD to use digital reminders or organisational apps;
- allowing someone who suffers from chronic pain issues to take regular breaks and attend therapy;
- allowing flexible hours for an employee who has particular religious requirements.

These accommodations (towards inclusion) may not, however, be reasonable for every workplace. What is reasonable will depend on the employee's unique circumstances, balanced against the needs and circumstances of the particular workplace. There may also be situations where inclusion is no longer possible because there are no accommodations that can reasonably be made to allow the employee to continue working, despite their diversity.

Whether we embrace it or not, diversity is a term that is likely to stay. It can be a tricky issue to navigate, but there can also be many positives from taking a pro-active approach.

We can support you in drafting appropriate diversity policies for your workplace. Or, if you find yourself faced with a challenging diversity or inclusion situation, we can help you through the process to find solutions.



More Sick Leave on the Way

The Government has passed a Bill increasing employees' minimum entitlement to sick leave from five days to 10 days per year.

The new legislation will come into effect on 24 July 2021.

Employees will become eligible for the extra sick leave at different times over the next year, in line with when their individual sick leave entitlement arises based from their work anniversary dates. New employees will receive 10 days entitlement as soon as they become entitled to sick leave, i.e. after six months in a job.

Employees who already have a sick leave entitlement when the legislation comes into force will become entitled to 10 days' sick leave on their next entitlement date. That is, on the 12 month anniversary of when they last became entitled to sick leave. Employees who already receive an entitlement to 10 or more sick leave days a year will not be directly affected by this change in the minimum entitlement.

The Government has also begun work to implement the recommendations of the Holidays Act Taskforce, which includes giving employees access to sick leave from day one of employment, as opposed to only being eligible after six months. The Government expects to introduce this legislation in early 2022.