

Equal Time

Newsletter of the Anti-Discrimination Board of New South Wales



Number 66 Autumn 2006

CONTENTS

Discrimination and unfair dismissal	1
From the President – Vigilantes rip unity to shreds	2
From the President – Race Discrimination on the rise	3
Stereotyping leads to discrimination	4
Deaf teenagers speak up	5
Genetic discrimination probe to scrutinise insurance industry	6
New guidelines on criminal record discrimination	7
Obituary – Graham Bulmer	7
Is there a right to request part-time work?	8
ADB and community forums	9
Legal Developments	10
ADB Conciliations	14

The contents of this publication are for information purposes only and should not be substituted for legal advice.

1.9 million compensation

The NSW Supreme Court has awarded a former security guard \$1.9 million in compensation for relentless and brutal bullying by his supervisor.

Refer to our story on page 11 for more information

Discrimination and unlawful dismissal

The Federal Government's Workchoices legislation commenced on 27 March 2006.

One of its effects – probably the most publicised one – is the restriction on employees accessing federal unfair dismissal provisions. Employers who employ fewer than 100 employees (including part-time and certain casual employees) are exempt from federal unfair dismissal laws. Workchoices also limits the ability of employees and unions to contest redundancy decisions made by employers.

Some lawyers and commentators have predicted there will be an increase in alternative claims to unfair dismissal, including those brought under various federal and State anti-discrimination and OH&S legislation. Unlike some other State industrial and employment laws these have not been specifically excluded under Workchoices.

Employers should be aware that it remains unlawful in NSW to dismiss an employee on the basis of the following personal characteristics:

- Race
- Age
- Sex
- Pregnancy
- Homosexuality
- Carers' responsibilities
- Transgender status
- Marital status
- Disability

In addition, an employer cannot dismiss an employee because they have made a complaint about unfair treatment on any of the grounds listed above, or about sexual harassment.

All employers in NSW are bound to observe discrimination legislation provisions regarding race discrimination and sexual harassment. There are some exemptions for businesses that employ five or fewer employees with regards to the other grounds.

Employers who breach NSW anti-discrimination law run the risk of being involved in a contested discrimination case, which may involve significant costs in terms of time and money, and if the case is not resolved successfully, court proceedings.

For more information about how anti-discrimination law affects employers, refer to our website at: www.lawlink.nsw.gov.au/adb

From the President

Worst possible outcome – *vigilantes rip unity to shreds*

This article was first published in the Sydney Morning Herald on 12 December 2005 following the Cronulla riots



YESTERDAY we witnessed a sight that I thought we would never see in Australia.

A few years ago Australians of all backgrounds – indigenous, Muslim, Asian, European – united to display national pride, Australian pride, to

leaders condemn the actions of these young thugs just as the rest of us do. Yesterday, as if on cue, people took this opportunity to reclaim territory – whatever that means.

What we now have is the worst possible development in any society

they created, so vividly captured on our TV screens, and ask themselves if they are really different to the thugs they set out to discipline.

What happened in Cronulla was an attempt at organised and premeditated mob violence. There's no other way to describe it.

The Australian way of life they claim to uphold includes the tradition of civil obedience and support for the lawful institutions of this land. Thugs terrorising beachgoers are not the product of multiculturalism, just as vigilantes are not the product of Australian heritage.

What happened in Cronulla was an attempt at organised and premeditated mob violence. There's no other way to describe it.

put on the best ever Olympics.

A few weeks ago tens of thousands of people, young and old, combined to help our Socceroos ride the wave to the World Cup. Those Australians were, again, of all backgrounds. Young girls wearing the Islamic hijab were proudly displaying green and gold.

And then at North Cronulla beach we had a bunch of thugs bashing that great symbol of Australian devotion to their countrymen, surf lifesavers.

It is sad that these thugs appear to be more or less of the same ethnic background, or are perceived to be, because that causes pain to the hundreds of thousands of people of that background who live and work peacefully. That community's

– people taking the law into their own hands, contributing directly to the breakdown of law and order.

People formed vigilante groups,

Thugs terrorising beachgoers are not the product of multiculturalism, just as vigilantes are not the product of Australian heritage

using telephone text messages to whip up hatred of people of a particular race or religion. This is no different to what the thugs are accused of doing.

Those who participated in the war of Cronulla should revisit the scenes

Let us all get behind our police force and bring the perpetrators to justice, regardless of their background

Stepan Kerkyasharian AM

From the President

Race discrimination on the rise

Enquiries about race discrimination have risen alarmingly since the recent events in Sydney's southern beaches, according to the President of the NSW Anti-Discrimination Board, Stepan Kerkyasharian.

'These incidents are not just in the beach area,' Mr Kerkyasharian said. 'People who are thought to be of Middle Eastern background are being harassed in the workplace and abused in shops and restaurants.'

Mr Kerkyasharian said that NSW anti-discrimination law provides a very effective mechanism for dealing with this kind of treatment.

'It is unlawful to treat someone differently because of their racial background, and employers and service providers must make sure that people are not harassed or discriminated against on their premises,' he said.

'It is also unlawful to publicly incite racial hatred, contempt or ridicule – this is called racial vilification.'

Generally, the Anti-Discrimination Board can only take action about specific cases of discrimination or vilification if it receives a written complaint. In the case of vilification, the complaint must be from a person or people from the racial group that is being vilified.

'Most complaints that are covered by anti-discrimination law can be resolved quickly and confidentially through our conciliation process,' Mr Kerkyasharian said.

'Solutions may include an apology, financial compensation, gaining access to a service or benefit that you were denied, getting the employer or service in question to run training programs on discrimination, and so on.'

'The law also allows for urgent action to be taken in special cases, for example if someone is about to lose their job or accommodation.'

'Anti-discrimination law protects everyone in NSW from unfair treatment, no matter what background they come from. I would encourage anyone experiencing race discrimination to contact the Board's Enquiry Service on (02) 9268 5544, or 1800 670 812 if you are ringing from outside Sydney, or (02) 9268 5522 for our TTY.'

The above is the text of a media release by the President of the Anti-Discrimination Board following the 'Cronulla riots' in December 2005.

For More Information

The following Anti-Discrimination Board publications are available for a small charge:

- Anti-Discrimination and EEO Guidelines – For Managers, Team Leaders and supervisors
- Discrimination, Harassment and EEO Guidelines for non-supervisory staff
- NSW Anti-Discrimination and EEO Guidelines for small business owners and managers
- Harassment in the workplace
- Grievance Procedure Guidelines

To order, contact Milly Stylli on 9268 5555

Need help with grievance handling or harassment and bullying issues?

The Anti-Discrimination Board can provide on-site training in your workplace, custom-designed to meet your individual needs.

For more information contact:

Sydney: Murray Burke on (02) 9268 5519

Wollongong: Lesley Coombs on (02) 4224 9960

Newcastle: Belinda Munn on (02) 4926 4300

Stereotyping leads to discrimination

What are country people like? And Sydneysiders? What are Rugby Union supporters like? Or League fans?

The chances are, that if you are in one of these groups, you'll be able to describe the opposite group in some detail. Is your description complimentary and positive? Or do you see them in a somewhat less flattering light than the members of your own group?

What you've done, is to come up with a **stereotype** of the people in each of these groups. There's nothing wrong with that. We all do it all of the time. And we tend to see people in groups other than our own in a less flattering light than people who are just like us. That's normal too.

In the workplace, however, or in the provision of goods and services, rental accommodation, registered clubs or public education, if you make decisions on the basis of a stereotype, you could be discriminating against them.

What is discrimination?

Discrimination is when you treat someone less favourably than others, in the same or similar circumstances (direct discrimination) or when you impose a requirement or condition with which most people can comply but with which is difficult for people in particular groups. If the requirement is unreasonable in the circumstances, you may be guilty of indirect discrimination.

Of course, not all stereotypes are covered by the Anti-Discrimination Act. If you treat someone who came from Tasmania less favourably

than others because you have a poor opinion of Tasmanians, that is not unlawful. If you treated an Indigenous person from Tasmania less favourably because of your stereotypical beliefs about people of his or her race, that would be unlawful.

Under NSW law, it is unlawful to discriminate against people because of their sex, race, marital status, pregnancy, age, disability, homosexuality, transgender or carer responsibilities. It is also unlawful to discriminate against someone because they are a relative or associate of a person in one of those groups.

Public acts designed to cause serious contempt, hatred or ridicule of a racial group, people with HIV/Aids homosexuals or transgender people, is vilification and that too is unlawful, as is victimising someone because they have complained about discrimination.

The law in action.

Two recent cases illustrate how stereotyped views about people in particular groups can result in a finding of unlawful discrimination.

In one case¹, a woman who had breast cancer won a holiday to Japan. When she went to get travel insurance, however, she was refused. Insurance companies are allowed to discriminate against people if they have actuarial data to prove that

1. QBE Insurance v Bassinelli [2004], 7/4/04, FCA396

those people pose a higher than normal risk to them.

In this case, the insurance company argued that its 'medical appraisal guidelines' said that 'conditions that should be considered for "no policy"...are terminal cancer'.

The Federal Magistrate agreed that this was unlawful discrimination on the ground of the woman's disability. He said that there was only anecdotal evidence of previous large claims by people with breast cancer and no firm actuarial evidence relating to her condition. He said that the company's decision was based on a stereotype of people who have breast cancer as being terminally ill.

The woman was awarded \$5,000 plus costs.

The other case involved Virgin Airlines and it got a lot of media attention at the time.² After the collapse of Ansett a lot of their former employees applied for jobs at Virgin.

When a number of them applied for jobs as flight attendants they participated in a group assessment process to test for 'behavioural competencies'. Part of this selection process involved singing and dancing. A group of women aged between 35 and 60 argued that this was indirect discrimination against them because of their age.

They claimed that the process was

2 Hooper ans ors [2005] HEA03/105 10/10/05.

continued on page 5

Stereotyping leads to discrimination *continued from page 3*

geared towards younger applicants and a higher proportion of the younger applicants were able to comply with the requirement.

They had a false start in 2004, when they were not able to prove their case because they didn't have the figures to show what proportion of younger to older people got through to the next round in the selection process.

When they reapplied in 2005, they were able to show that a disproportionate number of people under 35 were selected. They argued that this was because the assessment panel was made up of young people who saw young people as more suitable employees than older people.

They pointed out that the members of the panel had not been trained to assess the suitability of applicants regardless of age. Furthermore, the airline had not checked whether

older people who were suitable were rejected.

The court was persuaded by these arguments and said that the panel had applied stereotypical beliefs about the attributes of younger people as against older people. The amount of compensation payable is still being assessed.

The golden rule.

So you think you know that women are better at the job you are seeking to fill. Or that older people are more mature and responsible than younger ones. These are stereotypes and it may be true that more women than men or more older people than young ones have the attributes you are looking for.

You could never say, however, that **all** women or **all** older people are better than men and young people for the job. If you use a stereotype to decide who to employ, not only

could you be discriminating against the others, you could be losing the best person for the job.

Non discriminatory selection practices involve deciding what the job requirements are, and what attributes a person will need to meet the job requirements. Sometimes, race or sex or whatever will be a necessary job requirement and, if so, you can apply to the Anti-Discrimination Board for an exemption. In most cases, however, these things are not relevant.

You might find that a 25 year old applicant is more mature than a 55 year old. It is the quality you are looking for, not the age, sex, race, disability etc. of the applicants.

It's in everyone's interests to try to look past stereotypical beliefs and to assess people as individuals with individual strengths and weaknesses.

Deaf teenagers step forward

Being a teenager at high school can be tough sometimes – homework, teachers, girlfriends, boyfriends...growing up

The Board recently delivered a series of education sessions to Deaf high school students, designed to educate them about their rights at school and also to prepare them for their entry into the workplace.

The students had their own stories: what its like to be different from hearing kids, using interpreters, getting an education and dealing with bullying. Many of these issues are common to students generally. However, being Deaf can bring particular challenges.

Foremost is having accessible education via suitably qualified interpreters and other equipment. Many Deaf students are born into

hearing families. They may grow up feeling isolated from their peers and their own families due to communication difficulties. This sense of isolation may be increased in the school environment especially if they are the only Deaf child at their school.

Achieving literacy in English can also be difficult without hearing the language. It is very important that students have access to skilled signing interpreters who can assist the learning process. Improving access to education also leads to a sense of confidence and self worth which increases the chances of Deaf students entering the workforce or

pursuing further studies.

The sessions were very lively and interactive through the use of a series of scenarios and case studies. Students were encouraged to think about their rights and use strategies to resolve difficult situations. This might involve talking to a teacher or school counsellor about their problems.

The sessions were presented in conjunction with the Deaf Society of NSW, NSW Association of the Deaf and the Disability Discrimination Legal Centre. Special thanks to Dr Breda Carty from Thomas Pattison School who facilitated the presentations.

Genetic discrimination under the microscope

Insurance industry probe

An investigation has begun into claims that insurance companies have discriminated against people because of their genetic make-up.

As reported by ABC News, in the first investigation of its type in the world, the Federal Government-funded Genetic Discrimination Project (GDP) is investigating around 100 claims of unfair and negative treatment of people who have had predictive genetic tests, mainly involving life insurance companies.

The team is investigating claims that some people have been discriminated against after genetic testing for a gene linked to a specific disease, despite the fact that they did not yet have the condition.

Dr Sandra Taylor a GDP Team member says that around 47 per cent of 1,185 people surveyed say they have been disadvantaged as a result of tests for conditions ranging from Huntington's disease and haemochromatosis to ovarian and breast cancer.

Of these 438 or so people, around 87 provided specific incidents of

negative treatment, from insurance companies, doctors, employers and family members.

Dr Taylor says around 15 per cent of people surveyed say they have avoided applying for life insurance because they had been advised they would be unsuccessful given their test result.

DDA to be extended

The Federal Government is planning legislation that will extend the Disability Discrimination Act (DDA) to include genetic predispositions in order to protect people with disability from discrimination on the grounds that they will be unable to perform the inherent requirements of a job in the future. This was announced as part of the government's response to an Australian Law Reform Commission and Australian Health Ethics Committee report *Essentially Yours: The Protection of Human Genetic Information in Australia*.

The legislation – expected to be drafted in 2006 – will also ban employers from requiring genetic and other information on a person's disability unless it is 'reasonably

required for a purpose that does not involve unlawful discrimination,' said the response released in December 2005 by Attorney-General Philip Ruddock and Health Minister Tony Abbott.

The 'inherent requirements' defence will also be extended in the DDA. It will include all stages of employment, from hiring to dismissal, to 'allow employers more flexibility to make alternative working arrangements if they employ a person who later becomes unable to perform the inherent requirements of the job. This is intended to minimise concerns about employing a person who may in the future become unable to perform the inherent requirements,' the response said.

The government intends to establish a genetic testing advisory committee as part of the National Health and Medical Research Council. The new body – funded with \$7.6 million over four years from 2005-6 – will help develop policy affecting genetic privacy rights, ethics and discrimination in employment, the insurance industry, medicine, immigration and the justice system.

18th Women, Management and Employment Relations Conference

Sofitel Wentworth Sydney
27-28 July 2006

Presented by the Labour-Management Studies Foundation and the Macquarie Graduate School of Management at Macquarie University, the conference is in its 18th year and is the leading Women's Conference in Australia.

<http://www.lmsf.mq.edu.au/wmer/>



New guidelines on criminal record discrimination

The Human Rights and Equal Opportunity Commission has developed new guidelines regarding discrimination on the basis of criminal record.

On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record provides information and practical guidance on how to prevent criminal record discrimination in the workplace. It covers existing anti-discrimination and related laws, as well as best practice principles when recruiting or employing someone who may have a criminal record.

'In recent years there have been a significant number of complaints to the Commission from people alleging discrimination in employment on the basis of criminal record. The complaints indicate that there is a great deal of misunderstanding on the issue,' said

Human Rights Commissioner Dr Sev Ozdowski.

As a result, in August 2004 the Commission commenced a research and consultation project: to closely examine the extent and nature of this discrimination; to clarify the rights and responsibilities of employers and employees; and to consider measures which may be taken to protect people from this form of discrimination. *On the Record* is a result of this research and consultation process.

'More and more employers are asking job applicants to undergo criminal record checks. While in some cases it is crucial that appropriate selection procedures are used to screen out people with certain criminal records, some employers automatically bar from employment anyone with a criminal record, regardless of the offence or

the type of job,' Dr Ozdowski said.

'A basic principle of anti-discrimination is to enable an employer to refuse to employ someone if their criminal record is genuinely relevant to the essential requirements of the job. However, if a person's criminal record doesn't impact on the inherent requirements of the job, and that person is the best candidate for the job in every other way, these laws are designed to protect a person from being denied equal opportunity because of their criminal record. I hope that these Guidelines will assist employers to apply these principles in their own workplaces.'

For more information on criminal record discrimination visit the Commission's website at: www.humanrights.gov.au/human_rights/criminalrecord/on_the_record

Graham Bulmer

On 14 March Graham Bulmer, who had worked as a receptionist at the Anti-Discrimination Board for the past nine years, passed away at his home.

Graham gave many years of service to the Anti-Discrimination Board and he will be sadly missed. He joined the ADB in 1997 and has been a familiar face on the front desk since that time. He was aged 59.

Graham was making preparations for his upcoming marriage in May this year, and for this reason, his death is a particular tragedy for his fiancée and family.

Our thoughts are with Graham's fiancée, family and friends.



Is there a right to request part-time work?

Family Responsibilities Test Case flow-on

In NSW the rights of workers with carers responsibilities has been covered under the *Anti-Discrimination Act 1977* since amendments to the Act came into force in March 2001.

Since 8 August 2005 this has been coupled with the right to request part time work becoming an industrial entitlement under the Family Responsibilities Test Case for some employees covered by federal awards (nb this decision is not safeguarded under the new federal WorkChoices legislation).

For those covered under NSW awards, the NSW Industrial Relations Commission provided that such awards will be varied by general order on 19 December 2005 to incorporate the decision.

The NSW decision provides the following additional entitlements to workers covered by State awards:

- the right to request two years' unpaid parental leave (up from one year parental leave);
- the right to request part-time work until a child reaches school-age;
- the right to request both parents be allowed a simultaneous period of unpaid parental leave up to eight weeks (previously one week);
- an increase from five to 10 days in the amount of carer's leave that can be accessed yearly from accrued personal leave;
- the right for casuals to take two days' leave to attend to family matters; and
- an obligation on employers and

workers to communicate while an employee is on leave about changes to work arrangements.

The industrial 'right to request' provisions are qualified with the employer's right to refuse where there are reasonable grounds to do so.

Similarly, recent State discrimination case law has defined 'carer's responsibilities' to include consideration of a request for part time work. In a recent 2005 decision, an employer who refused a new mother's request to return to work part time unlawfully discriminated against her on the basis of her caring responsibilities. The company required that she return to her job after maternity leave full time. While it offered her alternative jobs that were part time, they weren't as well paid or convenient. The Tribunal said that company failed to give full and proper consideration as to whether the travel consultant could perform her role part time on the basis she proposed or a variation of her proposal. [*Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 204 (15 December 2005)].

In another case, an employer who did not give 'due consideration' to a manager's right to request part time work was found to discriminate on the ground of carer's responsibilities. The woman had asked to work three days per week temporarily as she had been unable to find suitable childcare. The company refused on the basis that they needed the woman to work full time as she was a manager, and they believed her proposal was unworkable. The

Tribunal found in the circumstances the requirement to work full time was unreasonable. It found that the company had failed to properly consider the woman's proposal and had responded to it in a 'knee-jerk' way. The company was ordered to pay the woman \$16,000 [*Reddy v International Cargo Express* (2004) NSWADT 218]

For more information on Carer's Responsibilities please go to our website at: http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_carers_responsibilities



Staff from the ADB Workplace Education Team recently attended the 2006 HR Summit at the Sydney Hilton.

The Summit provided an excellent opportunity for ADB staff to network with HR professionals, promote ADB training services and discuss issues of concern.

Pictured: Margaret White, ADB Senior Education Officer (right) with a conference participant

Information session for women from middle-eastern backgrounds

ADB Senior Workplace Relations Consultant Sharmalee Elkerbout faced a different audience from her usual training participants at a workshop at St George Migrant Resource Centre in March. Sharmalee presented an information session about rights under discrimination law to a group of elderly women from Middle Eastern backgrounds, with the assistance of an Arabic interpreter.

Many of the women spoke about being abused in the street and other situations, as they were identifiable as Muslims because of their hijabs (headscarves). They said they were committed to Australia and could not understand why they were being treated in this way.



Participants at the workshop with ADB Senior Workplace Relations Consultant Sharmalee Elkerbout (centre back), interpreter Sanaa Atiyah Hammad and St George Lebanese Joint Committee Community Development Worker Ghada Hijazi (first and second left).

The women were interested in other aspects of discrimination law as well as the race-related provisions, especially age discrimination, carers' responsibilities discrimination, pregnancy discrimination and sexual harassment.

Sessions such as this one have a multiplier effect as participants take their new-found knowledge home to their families and friends. They are a significant way to increase awareness about rights under discrimination law in a user-friendly context.

'Good Service' forum held in Newcastle

Good Service – Servicing your Community is a forum about Aboriginal & Torres Strait Islander consumers' issues. This is the second forum and the first for 2006, which was held at the Awabakal Elders Services in Wickham.

We would like to thank Aunty Sandra Griffin for doing Welcome.

The presenters and participants on the day thought the forum was very informative – both got something out of the day. The participants particularly enjoyed having a variety of speakers from various organisations to talk.

Various concerns were raised with the relevant organisations ranging from service, employment and legal issues to where and how to deal with an issue.



Top Row: Dane Hickey (Office of Fair Trading, Dept. of Commerce), Sri Ogden (Legal Aid), Linda Brown (Energy & Water Ombudsman NSW), Blanch Lake (Arts Law Centre of Australia), Nathan Tyson (Australian Securities & Investments Commission).

Bottom Row: Vincent Scott (NSW Ombudsman Office), Vanessa Concepcion (Energy & Water Ombudsman NSW), Felicity Huntington (NSW Anti-Discrimination Board), Scott Campbell (NSW Ombudsman Office) & Geoffry Murphy (Commonwealth Ombudsman).

Legal developments

\$83k award after indirect bias

The Victorian Civil and Administrative Tribunal has found that a woman was indirectly discriminated against by a State public agency when it set her unreasonable performance standards.

The Vic Institute of Dryland Agriculture argued unsuccessfully that Julie Deckert's attitude had caused her to take so much time off work. If she had 'acted reasonably and accepted there was no campaign of intimidation', her issues could have been dealt with constructively, the Institute argued.

VCAT Deputy President Cate McKenzie disagreed, saying the Institute's actions in setting the standards had triggered Deckert's depression, and the medical evidence was she had been unable to work as a result. Workplace conflict had been a minor contributing issue.

Deputy President Cate McKenzie awarded the woman \$83,368.83; \$47,606.96 was for lost wages while she was off work suffering from depression and \$20,000 for stress, depression, anxiety and humiliation. DP McKenzie held each party must pay its own costs.

(Deckert v State of Victoria – Dept of Primary Industry – Victorian Institute of Dryland Agriculture [2006], VCAT 229, 3/3/06)

Shop owner sexually harasses under-18 workers

The Queensland Anti-Discrimination Tribunal has found that Barry John Shearer, proprietor of Palm Valley Sub-News at Mooloolaba, sexually harassed

three shop assistants, two of them aged 14 and 15 at the time of the incidents.

The Tribunal heard evidence that the proprietor had pleaded guilty in other proceedings to unlawful and indecent dealing with the 15-year-old employee and was sentenced for that and 16 similar counts to 18 months in prison, which was suspended after nine months.

The proprietor did not appear at the Tribunal hearing.

ADTQ Member Gerard Mullins accepted that the proprietor had engaged in conduct that included patting and grabbing the women on the bottom, touching their breasts, hugging them, suggesting that he could take nude photos of them and showing them pornographic pictures.

The tribunal partly relied on statements the minors made to the police about the incidents.

The damages included amounts to compensate each of them for being significantly underpaid in comparison with award rates of pay.

Member Mullins ordered Shearer to pay the women \$24,437, \$23,305 and \$21,819 respectively, plus costs.

Dale, Larkin and Loffler v Shearer and another [2006] QADT 1 (16 January 2006)

Queensland sex discrimination claim upheld

The Queensland Anti-Discrimination Tribunal has found that an employer that refused an accountant's request to return to full time work after maternity leave denied her not only a full time

income but also significant bonus payments.

The accountant had worked as a casual during her maternity leave. When she sought to return to work on a full-time basis, the employer told the employee she could only return to work for a few half days a week for six months, then full-time for six months before reverting to casual work.

The employer had, during the employee's maternity leave, engaged another accountant for at least 20 hours a week, and then 'decided it was not in the best interests of the business to allow [the accountant] to return to full time employment immediately after Christmas 2003'.

Tribunal member Peter Roney found the principal had been influenced by concerns that the accountant might have another baby and cause disruption to the business.

Mr Roney ordered the Bundaberg accounting firm to pay the accountant \$21,000 in damages, including \$5,000 for hurt and humiliation and \$5,160 for bonuses she missed out on. He said he would be inclined to order costs to the employee, but asked the parties to try to reach agreement.

Pressler v Stewart [2005] QADT 33 (24 November 2005)

Refusal to allow part-time return to work discriminatory

The NSW Administrative Decisions Tribunal has partially upheld a claim that the TravelSpirit Group Pty Ltd unlawfully discriminated against a new mother on the basis of her caring responsibilities.

The company refused her request to return to work part-time following maternity leave. They offered her alternative jobs that were part-time, however they weren't as well paid or as convenient. They also discriminated against her when they

continued on page 11

Legal developments *continued from page 10*

banned her from speaking Arabic at work.

The Tribunal found that the company failed to give full and proper consideration to whether the travel consultant could perform her role part-time on the basis she proposed, or a variation on her proposal.

The company also discriminated against the consultant on the basis of race when it directed her not to speak in Arabic at work, the Tribunal found.

It ordered the employer to pay the consultant \$5,000 in damages.

Tleyji v The TravelSpirit Group Pty Ltd [2005] NSWADT 294 (15 December 2005)

Homosexual vilification on the Internet

The Administrative Decisions Tribunal has upheld a complaint of homosexual vilification regarding material posted on a personal website and on various internet chat groups.

Mr Collier, a gay man and long term gay activist, came across material that had been posted by Mr Sunol on his own website and on several other websites. He made a complaint to the ADB about eight statements, published in four items on the various sites alleging that they vilified homosexual people in breach of section 49ZT of the Anti-Discrimination Act.

Mr Sunol admitted to publishing some of the material but also claimed that his site had been

hacked into and material placed on it to discredit him. He was not able to produce any evidence to prove that this was the case. The Tribunal concluded that Mr Sunol was responsible for publishing much of the material.

To decide whether the material unlawfully vilified homosexual people the complaint had to satisfy four criteria. The material had to be:

1. a public act;
2. which incites;
3. hatred towards, serious contempt for or severe ridicule of a person or group of persons;
4. on the ground of the homosexuality of the persons or members of that group.

The ADT then must consider whether any of the exceptions allowed under section 49ZT(2)

continued on page 12

\$1.9 million in damages for workplace bullying and racial vilification

The NSW Supreme Court has awarded a former security guard \$1.9 million in compensation for relentless and brutal bullying by his supervisor.

The Fijian-born employee suffered post-traumatic stress disorder and depression after being subject to physical assaults, indecent exposure, racist and sexist verbal abuse, financial threats and extreme and unpaid hours while working with the companies between 1992 and 1997. He has not worked since.

Mr Naidu would start work at 7am and not be allowed to go home until 10pm. He was regularly sworn at, called names such as 'cocunut head' and 'monkey face', and when he wanted to go to the toilet he would have to ask his supervisor's permission.

NSW Supreme Court Justice

Michael Adams described the abuse of Mr Naidu at the hands of News Ltd's security and fire manager, Lance Chaloner as extraordinary.

The court heard the abuse started in 1992, when Mr Chaloner threw tantrums and would kick chairs from under Mr Naidu.

The judge said the most extreme behaviour exhibited by Mr Chaloner was during a strike in 1993, when the guards were required to live on the premises of Cumberland newspapers. Mr Naidu was forced to guard the shower cubicle, which did not have a door. He gave evidence that Mr Chaloner would masturbate in the shower, taunt him, and on emerging, squeeze Mr Naidu's genital area.

News Limited will share the damages with Group 4 Securitas

which employed Mr Naidu.

Justice Adams included a disputed award of \$100,000 in damages against Group 4 Securitas for breach of its employment contract, which he found contained an implied term that the employee 'would not be intimidated by physical or verbal abuse by persons with whom he was required to work nor was he to be subjected to personal or racial vilification'.

The calculation includes \$150,000 in exemplary damages against News Ltd and general damages of \$350,000 (\$200,000 by News Ltd and \$150,000 by Group 4), with the bulk of the rest for lost earnings, medical expenses, costs and interest.

Naidu v Group 4 Securitas Pty Ltd & Anor [2006] NSWSC 144 (15 March 2006)

Legal developments *continued from page 11*

apply. The onus of showing an exception applies is on the respondent.

The Tribunal found that the publication of the material on publicly accessible websites was a 'public act' that occurred within the Tribunal's jurisdiction.

They also found there was incitement to hatred or serious contempt in seven of the eight statements complained of. The statements did not merely convey Mr Sunol's feelings of hatred and contempt but also contained strong epithets, derogatory labels and serious allegations as to why other people should develop such feelings. Other comments urged readers to engage in conduct that is adverse to homosexuals.

To fit the criteria of section 49ZT the incitement must be 'on the grounds of' the homosexuality of the person or group. The Tribunal looked at the eight statements and concluded that in five of them homosexuality was put forward as the reason why they should be the subject of hatred and/or serious contempt.

The Tribunal rejected Mr Sunol's arguments that an exception under the Act should apply saying that four of the statements were nothing more than sweeping generalisations of a highly insulting and offensive nature. One statement regarding the 'Gay Lobby' may have been defensible and therefore within the exception but for the fact that the language used was extreme and hostile.

In a subsequent judgment, the Tribunal ordered Mr Sunol to pay Mr Collier's costs. It also required Mr Sunol to remove from all websites controlled by him any material concerning homosexual men, lesbians, homosexuality or

the gay lobby and to refrain from publishing material on any of these topics on any other website. Mr Sunol was ordered to post a specific apology on various websites including all sites controlled by him.

Mr Sunol is appealing against the original decision.

Collier v Sunol [2005] NSWADT 261

Collier v Sunol [2006] NSWADT 88

Race discrimination claim against Real Estate agency

An Aboriginal woman from the Bundjalung community who lives in Casino tried to rent a property through JM Realty and was advised of five available properties. After completing the application form and submitting references she was advised by JM Realty that she would hear from them soon. Over the next fortnight she contacted the agency regularly with no success. After her brother-in-law and sister-in-law, who are not Aboriginal, enquired about similar properties and were informed of a number available, the woman and her mother went to the Agency and enquired about available rental properties – they were told there were none available. Consequently she lodged a complaint of direct race discrimination in breach of section 20(1) of the Anti-Discrimination Act.

The NSW Administrative Decisions Tribunal found that there was no evidence presented which proved that similar applications from non-Aboriginal people were treated differently. Ms King's brother-in-law and sister-in-law had not actually applied for a property and they were therefore not an appropriate comparator. In the absence of a suitable comparator that allegation ie breach of

s20(1)(a) was not proven.

However, the Tribunal found that Ms King's subsequent visit to the agency with her mother was, in effect, a further request for accommodation. The proper comparison therefore is with other non-Aboriginal people who made the same enquiries about accommodation on that day. Ms King's brother-in-law and sister-in-law's treatment is relevant for the purposes of that comparison.

The Tribunal found that in relation to her subsequent enquiry on the same day as her brother-in-law and sister-in-law Ms King had been treated less favourably than other people who also enquired about rental properties in that range on that day.

The Tribunal found that Ms King had a prima facie case that in comparison with other people making enquiries about a rental property that day, the reason she was not given any listings was because of her Aboriginality. The Tribunal looked at the evidence and concluded that there was no more probable and innocent explanation for the treatment of Ms King.

There was evidence from Ms King that she suffered hardship as well as physical and emotional difficulties as a result of being unable to find suitable accommodation until 8 to 9 months after the incident. Her claim was based on psychological damage rather than economic loss. The Tribunal accepted that Ms King's had suffered a psychological injury but that her mental state was only partially a result of her treatment by the agency. It awarded her \$3,000 for non-economic loss.

King v John McMahon Stock and Realty Pty Ltd t/as JM Realty [2005] NSWADT 260

continued on page 12

Legal developments *continued from page 12*

Pregnant worker discriminated against.

The NSW Administrative Decisions Tribunal has found the North Coast Area Health Service indirectly discriminated against a heavily pregnant blood collector by failing to provide her with light duties. Additionally it found NCAHS was not properly prepared to deal with the needs of pregnant employees.

The bench pointed out that the NCAHS was prepared to provide light duties to employees on workers compensation and accommodate those within its budget constraints, but not to pregnant employees.

It said it wasn't good enough for the employer to merely impose the discriminatory requirement that the employee continue with her normal duties. Before imposing such a requirement NCAHS was required to do more in the circumstances than to say, in effect, 'there is no policy, there are no vacancies, there's no money, and there's no legal requirement' (to accommodate the request for light duties).

The bench said that imposing the requirement had no 'logical and understandable basis', for the following reasons:

- the absence of a written policy to deal with requests such as [the blood collector's];
- the absence of any training of staff as to how to deal with requests such as [the blood collector's];
- the absence of a system that explored the possibility of alternative arrangements in response to requests such as Ms Jordan's; and,
- relatedly, the provision of light duties to an employee whose inability to work is protected by workers compensation

legislation, but not to an employee whose inability to work is protected by anti-discrimination legislation.

The Health Service has been ordered to pay \$7500 in compensation.

Jordan v North Coast Area Health Service (No 2) [2005] NSWADT 258 (16 November 2005)

No exemption for Baptist Church

The Victorian Civil and Administrative Tribunal has rejected an application from a Baptist Church agency that would have allowed it to only employ people with particular Christian beliefs to work in its outreach and community care projects.

Mornington Baptist Church Community Caring Inc. (MBCCCI) wanted to employ people who had 'publicly confessed Jesus Christ as both saviour and lord of their lives, have been baptized as believers in obedience to Christ's command and are walking in daily fellowship with Jesus and his people'.

Deputy President Cate McKenzie wasn't convinced that an organisation that operated programs for all people without discrimination should itself be allowed to discriminate as to who it employed.

She said a diversity of beliefs among employees could be beneficial to clients of the service, would better reflect the diversity of the Mornington community and would also give the organisation a bigger skilled employee pool to draw on.

Deputy President McKenzie said that if she received a further application from MBCCCI she may be prepared to allow a more limited exemption.

'Such an exemption could perhaps

permit an applicant for employment or employee to be asked to agree that they would not, in the course of their employment, criticise the Baptist faith and agree to a requirement that they would explain to clients the role of MBCCCI and its links with the Mornington Baptist Church, and also, if requested by clients, they would be able to refer these clients to someone either in MBCCCI or in the Mornington Baptist Church who could give them the necessary advice or guidance as to matters of Christian faith'.

Mornington Baptist Church Community Caring Inc (Exemption Anti-Discrimination) [2005]VCAT 2438 (10 November 2005)

Solicitor reinstated after dismissal for sexual harassment

The Queensland IRC has ordered the Queensland Department of Justice and Attorney-General to reinstate a solicitor after finding that his disrespectful treatment of female colleagues did not warrant dismissal.

The Commission accepted that the solicitor was genuinely remorseful for his conduct in putting his arms around his supervisor's hips while he was drunk. Commissioner Brian Blades said the solicitor's conduct was partly explained, but not excused, by his ingestion of alcohol.

The solicitor admitted to other conduct that the department had cited in dismissing him, but this occurred outside work. Commissioner Blades said this conduct was not 'serious enough to warrant the interference by the employer in this out-of-work-activity'.

Johnson v Department of Justice and Attorney-General [2005] QIRComm 188 (18 November 2005)

Anti Discrimination Board Conciliations



Sex and carer's responsibilities discrimination in employment

The complainant had worked for the respondent for a number of years. While on maternity leave she was advised that several positions, including hers, had been made redundant. The complainant still had another six months of maternity leave left and was told she could apply for any vacant positions on her return.

The Complainant contacted her employer before she was due to return to work to confirm her return date. She alleged she was told that there were no positions currently available that were similar to previous position and was given the option of moving into other positions, which did not have the same level of responsibility or duties requiring her skills. While other staff had been given the option of being made redundant, this option was not offered to the complainant.

The complainant alleged that she had been discriminated against because of her carer's responsibilities and sex in the area of employment.

Prior to conciliation the respondent advised that they would prefer to make an offer directly to the complainant to resolve the matter. After discussions it was agreed that the parties would attempt to settle the matter directly.

The Complainant's proposal of being paid a redundancy was accepted. The Complainant received \$11,300 a component of which included her statutory entitlements.

Disability discrimination in job recruitment

The complainant applied for employment with the respondent as a driver. The complainant underwent a medical assessment as part of the respondent's recruitment process. Upon consideration of the medical report, the respondent advised the complainant that it could not employ him because he could not undertake the duties of the position within a reasonable margin of safety. The complainant asserted that there was no reason for his being rejected for employment. He asserted that despite having undergone spinal surgery 30 years ago, this did not impede his ability as a driver. The complainant advised that he had previous experience and had held various classes of licences. Since applying for employment with the respondent, the complainant had obtained employment with another company as a driver.

The complaint was resolved when the complainant accepted a payment of \$4250 to settle the matter.

Marital status discrimination – accommodation

The complainant, a woman who was separated from her spouse, alleged marital status discrimination by a real estate agent after her application for accommodation was refused by the agent on the basis that the agent was not prepared to consider her child support payments as part of her income. The complainant alleged that

being in receipt of child support payments was a characteristic that generally appertained to people who are separated or divorced. She alleged that it was therefore unlawful to not offer the property to her. She asserted that her child support payments made up a substantial part of her income and she could demonstrably afford the rent.

The matter was resolved when the respondent re-considered the complainant's arguments and offered to rent her the property. The complaint accepted this and signed the lease.

Disability discrimination in employment & victimisation

The complainant was employed by a labour hire company as a driver for the respondent. The complainant worked exclusively for the respondent for a period of over five years. The complainant alleged that the respondent then encouraged the complainant to apply to be directly employed by them. The complaint took up the opportunity, but was later advised by the respondent that he was unsuccessful for the position because he did not meet the company's auditory standard. The complainant asserted that he had in fact already demonstrated his ability to perform the required work having worked in same position exclusively for the respondent for the past five years. The complainant also alleged that he was victimised when after complaining about the unfairness of not being employed directly by the respondent, he was then advised by the labour hire company that they could not provide him with further work because the respondent did not want him on their work site.

The matter was resolved when the National Manager of Human Resources intervened and the

continued on page 15

Conciliations *continued from page 12*

complainant accepted an offer of direct employment with the respondent.

Disability discrimination in the provision of goods and services

The complainant alleged that she had been discriminated against on the ground of disability by association when a specialist tribunal refused her request for a change of hearing venue to one which was closer to her home. The complainant, a single mother, has two young children each of whom require substantial care because of their respective disabilities. The complainant asserted that she wanted to take advantage of the benefit of presenting her case in person, but she could not comply with the tribunal's requirement to attend the listed hearing venue. She asserted that the requirement was not reasonable in the circumstances, because there was a venue closer to her home.

The complaint was resolved when the complainant's request was reconsidered and the matter was

re-listed at venue closer to the complainant's residence.

Carer's responsibilities discrimination in employment

The complainant applied for a professional position with the respondent. She alleged that the arrangements made by the respondent to determine who should be offered employment discriminated against her on the ground of her sex and her responsibilities as a carer.

She alleged that she attended an interview with the respondent who failed to ask her any relevant questions about her skills, qualifications or experience. Instead, the respondent continually asked her questions about her carer's responsibilities as a single mother. She alleged that the respondent made it clear that he would not consider employing her because of her carer's responsibilities. She alleged that after some time transpired and having heard nothing further from the respondent, she then made a

complaint about the treatment to the respondent's State office.

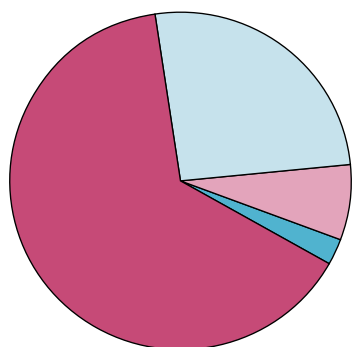
The matter was resolved when, after lodging her complaint with the Board and the Board writing to the respondent's national office, the respondent contacted the complainant and they came to a private resolution of the matter.

Disability discrimination in the provision of goods and services

The complainant, a young man suffering from autism, was a frequent customer of the respondent – a fast food outlet. He alleged that on one occasion after being provided with a receipt for his purchase, he noticed that the words 'freak-boy' had been included as the customer identification. The complainant alleged that this incident had had a significant affect on him and his self-confidence and that it had also been a set-back to the development of his social skills.

The matter was resolved when the complainant accepted a personal apology and \$4,000 to settle the matter.

ADB Complaints Finalised *Complaints closed between 1 July 2005 and 7 March 2006*



685 complaints closed since 1 July 2005

65% (443) closed within 6 months of receipt of complaint

90% (619) closed within 12 months of receipt of complaint

98% (668) closed within 18 months of receipt of complaint

2% (17 files) longer than 18 months.

Closed within 6 months
 Closed within 12 months
 Closed within 18 months
 Closed after 18 months

The Anti-Discrimination Board of NSW



What types of discrimination do we deal with?

The NSW Anti-Discrimination Board can only deal with discrimination complaints that are covered by the NSW Anti-Discrimination Act. This means that we can only deal with a discrimination complaint if:

- it is based on any of the grounds listed below and happens in one of the areas of public life listed below; or
- it is racial, homosexual, transgender or HIV/AIDS vilification, that is, a public act of incitement to hatred, serious contempt or severe ridicule.

The laws do not allow us to deal with discrimination complaints based on other grounds (e.g. religion, political conviction), or based on events in your private life.

Grounds

- Sex (including sexual harassment and pregnancy)
- Race (including colour, nationality, descent, and ethno-religious or national origin)
- Marital status
- Homosexuality (male or female, actual or presumed)
- Disability (past, present, future, actual or presumed)
- Age
- Transgender (transsexuality)
- Carers' responsibilities (in employment only)

Areas

- Employment
- Education
- Obtaining goods and services (e.g. credit, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

Where we are

Sydney

Level 4, 175-183 Castlereagh Street, Sydney NSW 2000
PO Box A2122, Sydney South NSW 1235
ph (02) 9268 5555, fax (02) 9268 5500, TTY (02) 9268 5522
Enquiries/Employers Advisory Service (02) 9268 5544

Wollongong

84 Crown St, Wollongong NSW 2500
PO Box 67, Wollongong East NSW 2520
ph (02) 4224 9960 fax (02) 4224 9961

Newcastle

Level 1, 414 Hunter St
Newcastle West NSW 2302
ph (02) 4926 4300 fax (02) 4926 1376
TTY (02) 4929 1489

Toll free number — 1800 670 812

Website — <http://www.lawlink.nsw.gov.au/adb>