

Equal Time

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CONTENTS

Workplace discrimination how union reps can help	1
ADB President resigns	2
From the Acting President	2
Think before you dismiss	4
Tribunal exercises discretion to award costs	6
Disability case in High Court	7
Legal developments	8
Gay and lesbian consultation anniversary	9
Successful conciliations	10
Mardi gras forum on 'the neglected communities'	11
New national human rights initiative	12

Many employers are unclear about their obligations towards injured workers under anti-discrimination laws. On page 4, Senior Workplace Relations Consultant Joan Napoli looks at a recent case which throws light on this issue.

Workplace discrimination how union reps can help

Trade unions can play an important role in assisting their members to combat discrimination and harassment in the workplace. They can also be held responsible if a union representative aids or abets discrimination or harassment, or fails to take action to prevent it. It is therefore very important that union representatives are fully informed about their responsibilities under discrimination law.

In general, the employer is liable for any discrimination or harassment that occurs in their workplace, unless they can show that they took 'all reasonable steps' to prevent it from occurring. This is likely to include at least the following:

- policies that clearly explain discrimination and harassment and the rights and responsibilities of all staff;
- a grievance procedure for discrimination and harassment complaints that is properly and fairly followed; and
- regular explanation of, and preferably face-to-face training in, these policies and procedures for everyone at their workplace.

Each of the anti-discrimination laws has a section that allows unions to be made legally liable if anyone representing the union, such as an organiser or delegate, causes, permits, aids or abets discrimination or harassment. This

could occur if a union representative fails to take action when a member is being harassed or discriminated against, or if the union does not allow management to change a discriminatory policy or practice.

For example, in the case of *Horne and McIntosh v Press Clough Joint Venture and the Metal and Engineering Workers Union* (WA Equal Opportunity Tribunal 1994), the union ignored the complainants' complaints about explicit posters and verbal abuse. When the women began taking the posters down themselves, the shop steward told them they could be blacklisted and would get no support from the union.

Both the employer and the union were found to have discriminated against the complainants, and they were awarded a total of \$92,000 in damages. The employer was

Continued on page 2

ADB President resigns

On Friday 2 May the NSW Attorney General, Bob Debus, announced that he had accepted the resignation of the President of the Anti-Discrimination Board and Privacy Commissioner, Chris Puplick.

The Director General of the Attorney General's Department, Laurie Glanfield, has assumed responsibility of managing the Anti-Discrimination Board until a new President is appointed. The Director of the Legislation and Policy Division of Attorney General's, Maureen Tangney, will act as Privacy Commissioner.



From the Acting President

It is the right of every person in NSW to live and work free from unlawful discrimination, harassment and vilification in their public life. The Anti-Discrimination Board performs an important role in promoting respect for human rights and community harmony and addressing discrimination in NSW.

I will be working closely with the Board's staff in furthering these aims. I believe it is an opportune time to recognise the Board's achievements, but also to review its activities. The Board needs to ensure that its own practices and procedures are effective in promoting its statutory charter and that complaints are resolved as efficiently as possible.

I welcome any suggestions for improvements to the services we offer the people of NSW and the achievement of our goals of eliminating unlawful discrimination and promoting equality of opportunity between all people.

I am keen to ensure that there is a clear separation between the complaint handling and administrative arrangements of Privacy NSW and the ADB. I would also like to examine whether a greater role may be fulfilled by the Statutory Board which currently comprises eminent members from academia, the non-government human rights sector and the church.

The Board will continue to work for the elimination of discrimination against men and women, people with disabilities, gay men and lesbians, transgender people, people with carers responsibilities, people of all races and of any age or marital status. We welcome the government's introduction of legislation to remove discriminatory age of consent laws in NSW which have afforded unequal treatment to gay men for many years, and we look forward to working to advance reforms in other areas that remain.

I wish to thank the staff of the ADB for their commitment and dedication, and I look forward to working with them as Acting President. and in the longer term as Director General of the Attorney General's Department, as they continue to work to promote equal opportunity and eliminate discrimination in NSW.

Laurie Glanfield

Workplace discrimination How union reps can help

continued from page 1

ordered to pay \$51,000 and the union \$41,000.

The first thing union representatives must do about discrimination and harassment is to make sure their own behaviour is discrimination and harassment-free, in order to be a role model for members as well as avoiding the risk of legal liability. They must know the limits at work and in union activities, such as not engaging in any inappropriate touching, not getting involved in group baiting or harassing of someone else, and being careful about the material they put up on the walls. If they supervise other staff, they must make sure all their decisions relating to promotion, pay, training, hours of work, leave and so on are not discriminatory.

Union representatives must also give all complaints appropriate consideration, and represent all members fairly. If a union member complains about another union member, each person is entitled to the same level of help and representation from the union, regardless of the issues involved, or who is the 'victim' and who is the 'offender'. It is best to make sure that each member is represented by a different union representative, and the representatives do not discuss the complaint unless asked to do so by both parties.

Another important role of union representatives is to make sure their members understand their rights and responsibilities in relation to discrimination and harassment. If

they witness behaviour which may breach the Anti-Discrimination Act, they should advise the person against such behaviour and tell them that the union will not support members who act like this.

Union representatives can also assist in disseminating information about members' rights under anti-discrimination law, for example by holding meetings, putting up posters and distributing factsheets. Although it is management's responsibility to make sure that all workers know about their responsibilities, union representatives can encourage management to put the appropriate policies, procedures and workplace training in place. They can also explain current grievance procedures and encourage members to use them.

Union representatives can also play an important role in negotiating with the employer to make workplace awards, enterprise agreements and other workplace policies, procedures and practices discrimination and harassment-free.

Since September 2001 all NSW awards have to be reviewed every three years, but an application to remove unlawful discrimination from an industrial instrument can be made to the Industrial Relations Commission by a party to the instrument at any time. The Anti-Discrimination Board and the NSW Department of Industrial Relations have published joint guidelines which explain how to review industrial awards, negotiate changes and get the changes formally approved.

Guidelines on how to make sure that all workplace policies, procedures and practices are discrimination and harassment-free are also available from the Board. These are aimed at employers, but union representatives will also find them extremely useful. Union

organisers and delegates can encourage management to act properly and speedily, and work with them to make sure that the required changes are made in a way that is fair and effective.

Union representatives are in a good position to raise issues of concern rather than waiting for management to do so. Areas to consider include:

- whether all jobs are open to both sexes and all races;
- mentoring and support programs for women in male dominated workplaces, and vice versa;
- whether there are differing pay rates for jobs at a similar level;
- making all jobs accessible to people with all types of disabilities;
- the potential of workplace design to facilitate harassment;
- making sure pregnant employees and those on parental leave are not disadvantaged;
- ensuring that those injured at work are not discriminated against;
- ensuring that promotion and training opportunities are based on merit;
- flexibility about hours of work for people with carers' responsibilities, disabilities or religious requirements;
- the fairness of restructuring and redundancy programs; and
- affirmative action strategies to help groups of workers who have previously been disadvantaged reach the same competitive level as others.

It is also vital that union representatives do not resist management when they are trying to make the workplace a fairer place for everyone, for example by promoting on merit rather than seniority. Neither should unions oppose management if they take disciplinary action against a union member who has been harassing, discriminating against or victimising another worker.

Another crucial role for union representatives is to help members to sort out complaints at an individual or group level. This can involve:

- checking the person's rights under all relevant laws;
- providing information about support groups;
- discussing options, giving advice and assisting them to talk directly with the person concerned, approach someone who has the power to fix the problem, and/or use any complaints/grievance procedure;
- making sure management investigates the problem quickly, fairly and confidentially;
- making sure the employee is not threatened or victimised because they made a complaint; and
- assisting them to complain to the Anti-Discrimination Board if the matter cannot be resolved.

Many important complaints and legal decisions relating to discrimination have occurred only because the union made a complaint on behalf of all or a group of its members, or provided legal representation for a member who couldn't afford to pay for a solicitor.

FOR MORE INFORMATION

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

Guidelines for union representatives

Identifying and eliminating discrimination in NSW industrial instruments

How to implement EEO in any organisation

Harassment in the workplace

Grievance Procedure Guidelines

To order, contact Milly Stylli on 9268 5555

Think before you dismiss.... employers' obligations to provide assist

Many employers appear to be unclear about their obligations towards injured workers under anti-discrimination laws. There seems to be a common belief that after employers have made attempts at rehabilitation and complied with statutory time limits under workers' compensation laws, they can dismiss an employee who is unable to return to pre-injury duties. This ignores a further step that is required before dismissal can lawfully take place.

An employer considering the dismissal of an injured employee who is unable to return to pre-injury duties must make some attempt to find out whether any assistance can be provided to help the employee perform those duties. They should also consider whether all the existing duties are essential to the position. Failing to do this before dismissing the employee can result in the employer being unable to defend a claim of disability discrimination by the employee.

A recent decision of the NSW Administrative Decisions Tribunal, *Perlidis v Brambles Security Services Limited Trading as Brambles Armoured* [2003] NSWADT 11, highlights the issues in this area. The employer argued that its dismissal of the injured complainant were not unlawful because it came within certain exceptions in the NSW *Anti-Discrimination Act*. Essentially, the Tribunal rejected this argument because the employer had not considered whether any assistance could be provided to help the complainant to do his pre-injury duties.

Disability discrimination in employment

The *Anti-Discrimination Act* provides that it is unlawful for an employer to discriminate against an employee on the ground of disability by, among other things, dismissing them. An exception applies if the person would be unable to carry out the inherent requirements of the particular employment; or would require services or facilities to carry out those requirements that would impose an unjustifiable hardship on the employer (s 49D(4)).

In determining whether the exception applies, the Tribunal is required to take into account the complainant's relevant past training, qualifications and experience, and if applicable, the person's performance as an employee. All other relevant factors that it is reasonable to take into account should also be considered.

From the wording of the exception in s 49D(4) it appears that an employer is required to prove *either* that the employee is unable to carry out the inherent requirements of the job *or* that services or facilities required by the employee would impose unjustifiable hardship on the employer. However, the High Court said that both arms of the exception must be met when discussing a similar provision in the federal *Disability Discrimination Act 1996* in the case of *X v The Commonwealth* (2000) CLR 177.

The Perlidis case

The complainant was employed as an armoured vehicle operator, a member of a crew which collected, transported and delivered cash, valuables and/or payroll on behalf of the employer's clients.

The complainant suffered a back injury at work in 1992, after which he was placed on light duties. Despite the employer's attempts to rehabilitate him, he was not able to return to his pre-injury duties, which involved lifting weights of up to 42 kilograms. The employer terminated the complainant's employment in 1996 on the basis that all efforts at rehabilitation had met with limited success, and that there was no certain prognosis for his return to pre-injury duties.

The complainant alleged that he was discriminated against by the employer in a number of respects, including that the termination of his employment was based on his disability. The employer argued that the dismissal of the complainant was based on his inability to carry out the inherent requirements of his job, not his disability. The Tribunal found that the complainant's disability was one of the reasons the employer decided to dismiss him, and awarded him \$16,365 in damages.

Inherent requirements

In defending the claim of discrimination, the employer relied on the exception in the first part of s 49D(4), that the complainant was not able to meet the inherent requirements of the particular

ance to injured workers

employment. The Tribunal accepted that lifting weights of up to 42 kilograms was an inherent requirement of the armoured vehicle operator's position, and found that the complainant was unable to meet this requirement.

Provision of services and facilities

The Tribunal then considered the second part of the exception in s 49D(4), that is, whether providing the complainant with services and facilities to enable him to do the job would cause the employer unjustifiable hardship.

Section 49C requires that all relevant circumstances of the particular case are to be taken into account when determining what constitutes unjustifiable hardship, including the benefits or detriments to any persons concerned, the effect of the disability, and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

The Tribunal determined that the employer is obliged to assess whether there are services or facilities that would enable an employee with a disability to carry out the inherent requirements of their position, for example by asking the employee or getting a workplace assessment. It said that while s 49D(4) does not require an employer to provide an employee with alternative or light duties, it does require them to consider whether the employee could carry out the inherent requirements of the position with the assistance of services or facilities.

The employer gave evidence that in recent years it had considered whether it would be possible to redesign the work of the armoured vehicle operators in a more 'ergonomically sensitive' way. However, there was no evidence that the employer had considered whether it was possible for the complainant to return to normal duties with assistance at the time he was dismissed. The employer was therefore not entitled to the benefit of the defence in sec 49D(4).

Section 54 defence

The employer also relied on the defence contained in s 54 of the ADA, which provides, among other things, that it is not unlawful to discriminate if this was necessary in order to comply with any other Act. The employer argued that it was required to dismiss the complainant in order to comply with the *Occupational Health and Safety Act*.

The Tribunal accepted that the complainant's health and safety may have been at risk if he had been returned to his pre-injury duties, and the health and safety of his co-workers may have been compromised if he had remained on light duties. However, the Tribunal said that because the employer did not explore alternative ways in which that work could be carried out, it had not established that it was necessary for it to dismiss the complainant in order to comply with the OHS Act.

The *Perlidis* case makes it clear that an employer attempting to rely on the exceptions in s 49D(4) and s 54 must be able to demonstrate that

they made some attempt to find out whether there were services, facilities or assistance that could be provided to enable the employee to carry out their pre-injury duties. Failing to do so will make it very difficult for an employer to defend a claim of discrimination if an employee was dismissed because of their inability to return to pre-injury duties.

Information about services and facilities

Depending on the nature of the employee's injury, there are a number of sources of information about services, facilities or assistance that could be provided to employees to help them perform their pre-injury duties. These include the employee's medical and rehabilitation advisors; the employer's rehabilitation advisor; the relevant trade union; a relevant disability association; and an OHS or ergonomics consultant.

Consider other laws also

This article focusses on employers' obligations in relation to the dismissal of injured workers under anti-discrimination law, but other relevant laws should also be considered before dismissal takes place. Under unfair dismissal laws, employers have the additional obligation of considering whether there is suitable alternative employment before dismissing an injured worker. Employers who are unclear about their obligations in this area should seek the assistance of their legal adviser or industry association.

Tribunal exercises discretion to award costs

Section 114 of the *Anti-Discrimination Act 1977 (NSW)* (ADA) states that each party will generally be expected to bear their own costs in cases that are referred to the Administrative Decisions Tribunal, unless there are circumstances which justify making orders relating to costs. Over the past few months there have been a number of cases where this discretion has been exercised, and costs have been awarded to both complainants and respondents.

One of the main circumstances in which the Tribunal will make an order for costs against a complainant is where it believes the complainant has abused the Tribunal's processes by making complaints that are frivolous, vexatious or lacking in good faith.

In a recent case, the complainant alleged that a large department store had discriminated against him on the ground of race by refusing to provide him with goods and services.¹ The Tribunal concluded that the complainant 'had no reasonable basis for believing that the conduct he complained of was on the ground of his race'², and dismissed the complaint.

It also awarded costs against the complainant, warning that 'it is in the public interest that parties to a complaint, whether complaining or responding, are on notice that they must not waste time and resources with arguments that do not genuinely address a complaint of discrimination under the *Anti-Discrimination Act*.³

The Tribunal has also indicated that it will more readily make an order of costs where a party has repeatedly refused to comply with the Tribunal's directions, or appear before the Tribunal when requested. In a recent case, an Appeal Panel of the ADT found that the complainant's failure to co-operate with the Tribunal's directions had contributed significantly to the respondent's costs.

The panel noted that 'toleration of complainant behaviour of this kind in a jurisdiction where ordinarily no costs orders are made allows them to inflict a punishment on respondents with whom they are aggrieved even if the ultimate suit is lost or abandoned.'⁴

Another decision by the Tribunal suggests that it may be more inclined to make an order of costs where it felt the complainant deserved more than the maximum amount of \$40,000 allowed by the ADA. In this case the Tribunal ordered the respondent to pay the complainant the full \$40,000, and noted that he would have been entitled to damages for economic loss far greater than this figure.

It was argued on behalf of the complainant that the award would be eroded if the complainant was required to pay his own legal costs (which were estimated to be about \$15,000-\$20,000) from the award of \$40,000. The Tribunal agreed and ordered the respondent to pay the complainant's costs.

In reaching its decision, the Tribunal also took into account the public

interest in the determination of this complaint, and reconsidered an earlier decision in which an Appeal Panel of the Tribunal had concluded that the complainant should not be required to bear the costs of the respondent's decision to contest the principles previously articulated in the *Maxwell* decision.

In instances where the Tribunal dismisses a complaint because it is frivolous, vexatious, misconceived or lacking in substance, s 111(2) of the ADA gives the Tribunal an unqualified power to order the complainant to pay the costs of the inquiry. However, the ADT Appeal Panel in the first case mentioned noted that this discretion has not been fully embraced in the equal opportunity jurisdiction, as potential complainants may be discouraged by the fear of costs being awarded against them if they are unsuccessful.⁶

For this reason, the Tribunal will usually only make a full costs order against a complainant where there has been an abuse of process, that is, in those cases where the complainant's conduct was frivolous, vexatious or lacking in good faith. The Tribunal is less likely to make an order if a complaint is found to be misconceived or lacking in substance, which may be for technical legal reasons such as jurisdictional limitations or absence of proof of key facts. In these circumstances respondents may be left to bear the cost, because of greater public interests involved in upholding the making of complaints of violation of human rights.⁷

Disability case in High Court

In another case, the Tribunal considered the question of whether costs should automatically be awarded in instances where the complaint is declined by the President of the Anti-Discrimination Board and then summarily dismissed by the Tribunal.⁸ The Tribunal noted that it should give significant weight to the fact that the President declined the complaint, but said that it was only one factor to be taken into account.

In this instance, the Tribunal refused to make an order for costs because it was satisfied that the complainant genuinely believed that he had been discriminated against. It was also satisfied that the complainant did not appreciate the significance of the President's decision to decline his complaint because of his poor English and his inability to obtain legal representation until the eve of the hearing. The Tribunal also took into account that the complainant had complied with the Tribunal's timetables and directions.

However, the Tribunal emphasised that 'respondents are entitled to be protected from wasteful and time-consuming crusades ... especially [in cases] where the respondent has fully cooperated in the President's investigation and subsequent Tribunal inquiry'.

Notes

- 1 *Sleiman v Kmart Australia Limited* [2003] NSWADT 21
- 2 at [81]
- 3 at [83]
- 4 at [50]
- 5 *Maxwell v Department of Corrective Services* (EOD) [2001] NSWADTAP 21
- 6 at [39]
- 7 at [43]
- 8 *Salama v Qantas Airways Limited (No. 2)* [2003] NSWADT 5

On 29 and 30 April 2003 the High Court heard an appeal from the Full Court of the Federal Court decision in *Purvis v State of NSW* [2002] FCA503 concerning the operation of the Disability Discrimination Act.

The appeal is brought on behalf of a boy who was enrolled in Year 7 at a NSW High School. He has a number of disabilities, including frontal lobe damage to his brain which manifests in uninhibited behaviour. The school was aware that his behaviour may raise concerns in relation to his integration into a mainstream school, and that he would have difficulty coping with the academic requirements of Year 7.

The Principal put in place a number of arrangements to accommodate the boy's needs. He attended the school between April and September 1997, and was suspended five times during that period for violent behaviour. In December 1997 the Principal excluded him from the school.

A representative of the boy lodged a complaint on his behalf, alleging that the decisions to suspend him constituted a breach of section 22(2) of the *Disability Discrimination Act*. He alleged direct discrimination within the meaning of section 5 of the Act.

In November 2000, the Human Rights and Equal Opportunity Commission found that the school had discriminated against the boy on the ground of his disabilities. The Commission accepted that the behavioural manifestation of brain damage could be treated as a disability for the purpose of the Disability Discrimination Act.

The Commission awarded damages, but refused to make an order that the boy be permitted to return to school. The respondent appealed to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on the ground that the behaviour manifestations of a disability were not to be treated as a disability within the meaning of section 4 of the Act, and that the Commission had erred in determining who the appropriate comparator was for the purpose of the direct disability discrimination claim.

Justice Emmett accepted the respondent's argument and remitted the decision to the Commission. The boy's representative then appealed to the Full Court of the Federal Court, which confirmed the decision. He then appealed to the High Court and special leave was granted on 5 November 2002. The High Court considered the meaning and operation of 'direct discrimination' and the question of what a disability is for the purpose of the Act.

The questions to be determined by the High Court include:

1. What is the relationship between the behavioural manifestations of a disability and a disability for the purpose of section 4 of the Act?
2. What is the proper meaning of direct discrimination under the Disability Discrimination Act, which involves a consideration of:
 - (a) The meaning of 'on ground of' in relation to causation.
 - (b) What is the proper comparator in a disability discrimination complaint of direct discrimination.

The decision was yet to be handed down at the time of going to press. Equal Time will keep readers informed of developments in the case.

Legal developments

ADMINISTRATIVE DECISIONS TRIBUNAL

Kimble and Souris v Orr

Race discrimination and racial vilification

Date of Decision: 11 March 2003

The complainants visited an apartment complex with a view to renting a unit. At the time the agency that owned the complex had two representatives on the premises, one who was responsible for leasing apartments, and the respondent, who was responsible for selling them (and also lived in the complex). The letting agent had problems with the keys for the units for lease, and the complainants were at the property for several hours. In the process of attempting to resolve the key problems there were several exchanges between the respondent and the complainants.

The complainants and the respondent disagreed about the exact nature of these exchanges, and the other main witnesses (the letting agent and the respondent's friend) did not give evidence. However, the Tribunal was satisfied that when the respondent became irate with the first complainant's persistent requests for help to access the units for inspection, the first complainant responded by persistently buzzing the respondent's unit. The respondent and the first complainant then engaged in a mutually abusive and offensive tirade, in which both parties were shouting and making statements using very offensive language.

The Tribunal was also satisfied that the first complainant started a further altercation when the complainants were leaving by shouting at the respondent, and that both complainants made offensive gestures to him. Although the complainants provoked the respondent, the Tribunal found that he responded in a racially discriminatory way by referring to the first complainant, who is Afro-American, as a 'black bastard' and a 'coon', and that he had also discriminated against the second complainant on the basis of the race of her husband. However, it found that the discrimination was not unlawful as the connection with goods and services or rental accommodation was not sufficiently direct.

The Tribunal found that as these abusive remarks were made in the hearing of other residents in the complex, they constituted a public act, and were capable of inciting hatred, serious contempt or severe ridicule of the first complainant. The complaint of racial vilification against the respondent was therefore substantiated, but the complaint of vilification against the second complainant could not be established, as it did not occur on the ground of her race.

The Tribunal awarded the first complainant \$2,000 in damages, saying that this award would have been greater if he had acted in a more restrained and less provocative manner. It declined to order the respondent to apologise, on the grounds that this was inappropriate given the level of provocation.

ADMINISTRATIVE DECISIONS TRIBUNAL

Bree v Luprevo Pty Ltd & Ors

Sex discrimination

Date of Decision: 11 March 2003

The complainant, who is Aboriginal, had shared premises owned by the respondent with a friend, who was the lessee. After a period the friend moved out, and asked the respondent if the complainant could take over the lease. The friend gave evidence that the respondent refused and said he thought the respondent was not capable of paying the rent. She said he had also previously complained to her about Aboriginal people visiting the premises.

The complainant said she then directly asked the respondent to lease the premises to her, but he refused and made remarks about Aboriginal people making noise, damaging houses and causing complaints from neighbours. She argued that this indicated that his refusal to lease her the premises was based on discrimination because of her Aboriginality.

The respondent denied the allegation, and said he had not objected to the complainant living in the house. He said that the complainant only asked to lease the premises after he had made arrangements for them to be leased to a new tenant. He also disputed many of the events contained in the statements of the complainant and her witnesses, relating to the circumstances of the original lease and the showing of the house to other prospective tenants after the complainant's friend had moved out.

The complainant introduced evidence from five witnesses including herself, whereas the respondent produced no additional evidence apart from his account of the facts and events. The Tribunal

found significant inconsistencies in the respondent's evidence, whereas it held that the evidence of the complainant and her witnesses was credible and persuasive. The Tribunal found in her favour and ordered that the respondent pay her \$10,000 in damages.

Although this case does not raise new legal issues, it highlights a serious breach of anti-discrimination law in NSW. In its judgement, the Tribunal noted that the right to housing is a fundamental human right recognised under various international human rights instruments. On this basis, the actions of the respondent amounted to a serious violation of human rights. The Tribunal noted that not all discrimination is equal in nature and effect and regards this type of discrimination – a denial of access to housing – as a serious offence.

ADMINISTRATIVE DECISIONS TRIBUNAL

Sheather v Daley

Race discrimination

Date of Decision: 12 March 2003

The complainant, a service station attendant, alleged that he was

dismissed from his employment because he refused to remove a small stud-style earring he wore in his left ear. He alleged that female colleagues employed by the respondent wore earrings and were not asked to remove them. He argued that he had therefore received less favourable treatment on the grounds of sex and the respondents had unlawfully discriminated against him.

The respondents denied the allegation, saying that the complainant had been employed on a trial basis and had breached his duties in various ways, including giving free cups of coffee to police and SES personnel without permission, spending too much time in the kitchen, being absent from his console and swearing at the respondents.

The Tribunal found that it was not uncommon for men to wear earrings such as the one worn by the respondent, and it would not constitute a safety hazard or interfere with the complainant's work. On the basis of the evidence provided it found that the earring was at least one of the reasons for the complainant's dismissal, and that this not need be the dominant or substantial reason to be discriminatory. It also found that the respondent did not object to

women in its employ wearing earrings.

The Tribunal also considered the respondent's application to have the complaint dismissed on the grounds that the Tribunal lacked jurisdiction to determine the matter, as the applicant had brought the same issue before the Australian Industrial Relations Commission.

The Tribunal determined that on the evidence available it was not possible to reach a conclusion on the status of the proceedings at the AIRC. It held that the applicant's claim under the NSW *Anti-Discrimination Act* and his claim before the Industrial Relations Commission concerned distinct and separate issues and were therefore open to concurrent prosecution.

The Tribunal found in favour of the complainant and awarded him \$16,956 in damages. It also ordered the respondent to pay the plaintiff's legal costs, agreeing with the complainant's proposition that he would effectively lose part of the compensation award if an order for costs were not made. The Tribunal also noted that the respondent did not attempt to settle the complaint despite opportunities to do so over a long period of time.

Gay and lesbian consultation anniversary

On Tuesday 19 April 1983 a group of gay men and lesbians calling itself 'Friends of the ADB' met with ADB staff under the leadership of the then President Carmel Niland.

The purpose of the meeting was to lobby for gay and lesbian law reform. Amendments to the ADA to include homosexuality as a ground had been passed in 1982 and came partly into effect in November 1983 and fully in March 1984. The regular meetings of the Board's Gay and Lesbian Consultation have developed from this meeting (followed several years later by our separate Transgender consultations).

In marking this twenty year anniversary, it is worth reflecting on just how much has happened in that period. The Board is pleased that the age of consent issue has recently been resolved looks forward to other issues affecting gay and lesbian people being addressed.

Successful conciliations

Carers' responsibilities discrimination and victimisation in employment

The complainant is employed with the respondent in the health services industry. He alleged that his employer discriminated against him on the basis of his carer's responsibilities when they rejected his application to work part-time in order care for his aged grandfather, whose health was in decline.

He also alleged that after he lodged a complaint with the Board, the employer victimised him by refusing him employment until he produced a clearance certificate indicating that he was fit to work after taking sick leave.

The complaint was resolved when the parties agreed to mutually specified hours of part-time work. The respondent also undertook to instruct its managers on managerial requirements in regards to carers' responsibilities and the NSW *Anti-Discrimination Act*.

Sex (pregnancy) discrimination in employment

The respondent had worked in a variety of positions since she began working for the respondent. She alleged that after informing her employer that she was pregnant, management's attitude towards her changed, the work-place culture became sexist, and this later culminated in her constructive dismissal.

She also alleged that since the commencement of her employment, she had been paid less than male

employees who worked in similar positions to her.

The matter was resolved when the complainant accepted an ex-gratia payment of \$7,000 and a statement of service to settle the matter.

Homosexual discrimination in employment

The complainant was a lesbian who is employed in the welfare area. She lodged complaints of homosexual discrimination, sexual harassment and victimisation with the Board.

The complainant alleged that due to the behaviour of a particular female colleague, a working environment developed at her office that was hostile to homosexual people. The behaviour included lewd jokes and comments about homosexual people and lesbians in particular, which were often directed at her. She also alleged that at an office Christmas party she was given a candle in the shape of a penis.

After complaining to management about the alleged treatment, she later discovered that all her belongings had been packed into a box whilst she was on leave, and that cartoons depicting sexual acts had packed in with her belongings. Following this incident, she then received written advice that her transfer request had been approved, even though she had not requested one.

The complainant sought an apology, reassurance and general damages from the respondent. At

conciliation the parties came to an undisclosed private settlement of the complaint.

Sex (pregnancy) discrimination in employment

The complainant was employed by the respondent as legal secretary. Shortly after the commencement of her employment she discovered she was pregnant and advised her employer. She alleged that her employer discriminated against her on the ground of sex, when they refused her request to take three months leave of absence in order to give birth to her child. (She was not entitled to paid maternity leave because she would have been employed for under twelve months at the expected date of confinement.)

The complainant also alleged that a male employee's request to take leave of absence was granted in circumstances which were not materially different to hers, and she was forced to resign due to her employer's refusal to grant her leave of absence. The complainant had been employed for a period of almost ten months at the time of her resignation.

The complaint was resolved when the complainant accepted \$8,000, a statement of service, and a statement of regret in settlement of her complaint.

Mardi Gras forum on 'the neglected communities'

The Anti-Discrimination Board held a very successful forum on 'the neglected communities' – transgender, transsexual, bisexual and intersex people – at Parliament House as part of the 2003 Gay and Lesbian Mardi Gras celebrations.

The keynote speaker was New Zealand Member of Parliament Georgina Beyer, who also featured recently in a documentary shown on SBS television. The first transsexual MP in the world, Georgina spoke compellingly about her combined experience as a transsexual and a politician, and as a role model for other transsexuals.

Georgina emphasised how important it is for the transsexual community to be positive about those who are successful in 'mainstream' contexts such as politics or education, and avoid the 'tall poppy' syndrome. 'I am a transsexual human being and a participant in society', she said.

Other speakers included Elizabeth Riley, General Manager of Sydney's Gender Centre, public health specialist and sexual health worker Jay Ramanathan, lawyer Rachael Wallbank, Anthony Briffa from the Androgen Insensitivity Syndrome Support Group Australia, and Glenn Vassallo from Bi Pride Australia.

Elizabeth Riley quoted the significant statistic of 60% unemployment among transgender people across the western world. She pointed to improving participation in the workforce as a crucial element in raising self esteem and standard of living for

transgender people, and giving a sense of purpose and normalcy.

Rachael Wallbank was the lawyer for Kevin and Jennifer in the recent Re: Kevin case (in which a female-to-male transsexual was found to be a man for the purposes of the *Marriage Act 1961*). She spoke of the need for uniform state laws on transgender issues, the crucial nature of gender affirmation surgery, and the need for the law to avoid classifying people and accept 'the mystery and complexity' of gender.

Jay Ramanathan gave a lively presentation on 'the medical paradigm', in which he pointed out that gender, and thus transgender, is a 'social' construct that does not fit into the traditional 'biomedical' model in which most doctors are trained and feel most comfortable. He advocated more collaboration and consultation between transsexuals and doctors, cross-disciplinary strategies, and changes to medical curricula and training programs.

Tony Briffa's presentation covered the rarely raised subject of intersex discrimination. Issues include

termination before birth once an intersex condition is known, the right for intersex people to decide their preferred sex rather than having it assigned and surgically imposed by doctors soon after birth, employment and insurance, and participation in sport.

The final speaker was Glenn Vassallo, who pointed out that the NSW Anti-Discrimination Act is framed in terms of binary opposites and does not specifically cover bisexuality or non-monogamous relationships. All other states in Australia mention bisexuality specifically in their legislation.

Although the time limit meant there was little opportunity for discussion after the presentations, both the speakers and audience members agreed that the event was unique in the issues it addressed and the feeling it generated, as well as being long overdue.

Papers from the forum are available on the Board's website at www.lawlink.nsw.gov.au/adb. A report of the forum and recommendations for reform will also be published in the next few months.

From left: Jay Ramanathan, then Board President Chris Puplick, Glenn Vassallo, Tony Briffa, Rachael Wallbank, seminar organiser Daniel O'Neill, Elizabeth Riley and Georgina Beyer.



New national human rights initiative

Each year the various Commonwealth, State and territory Commissioners for Equal Opportunity (or Anti-Discrimination) meet to discuss matters of mutual interest and to try to co-ordinate activities across the various jurisdictions.

A great deal of time is spent discussing current human rights policies and challenges; changes to legislation around Australia; the need to develop uniform methods of counting and recording complaints; the planning of national strategies to combat matters such as racist violence; the sharing of experiences among education initiatives and the particular problems which relate to handling indigenous complaints.

However, one matter which has become of increasing concern is the changes seeking to reduce human rights protection. Two recent examples have been the attempts by the federal government to reduce protections under the Sex Discrimination Act covering access to IVF services, and the attempts by a previous Western Australian government to recriminalise aspects of prostitution.

The Commissioners on each occasion coordinated their submissions and responses to government to try (so far successfully) to prevent these changes. These problems are seen as likely to increase rather than decrease in the future.

To this end the group decided at their recent Adelaide meeting to

establish a more formal mechanism to undertake this work: the Australian Council of Human Rights Agencies (ACHRA). For a variety of reasons (related to their structure and the existence of several separate Commissioners within their organisation) the federal and Tasmanian bodies were not able to join this new organisation. Thus, ACHRA is the national council of mainland State and territory Equal Opportunity and Anti-Discrimination Agencies.

ACHRA's stated purpose is to promote an understanding of and respect for human rights throughout Australia; to coordinate responses among all members to issues of common interest and to exchange information between Agencies with relevant other Australian, international and non-governmental agencies and organisations working in the human rights arena.

All the council's decisions must be unanimous, with each member having a single equal vote. The chairperson will be appointed for a two-year period, with the position rotating among the members. The initial chairperson is Dr Di Sisely from Victoria. She will appoint a person on her staff to co-ordinate the work of ACHRA and each jurisdiction will make some contribution to support that work.

Equal Time will report on the work and development of ACHRA in the years ahead.

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 (eg 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 (eg credit, advertising, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

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