

Equal Time

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CONTENTS

Age Old Dilemmas	1
Unfair Treatment... What to do	2
Who's Complaining	6
Legal Developments	8
Conciliations	10
About the Anti-Discrimination Board	12

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

People with intellectual disabilities will have a better chance to understand their rights under anti-discrimination law with the launch of 'Unfair Treatment... What to do'. The booklet and its launch are covered on pages 2-3

Age Old Dilemmas

The social and economic effects of an ageing workforce have been prominent in the media recently. Older workers are being urged to delay retirement but age discrimination makes it difficult for older people to get and retain employment. Margaret White, one of the Board's senior workplace relations consultants, discusses the issues.

Not long ago, the Board received an enquiry from a woman who had applied for a job in a newsagency. She had been made redundant when the newsagency she managed for 20 years was sold to a family who would manage it themselves. She was well qualified and had excellent references.

Failing to get the position, she presumed it had gone to someone better qualified. Imagine her surprise to see it re-advertised the following week! Could the fact that she was 65 have had something to do with it?

The ageing workforce

Concerns about the social and economic implications of an ageing workforce are being expressed increasingly. The Commonwealth Government's Management Advisory Committee, for example, has warned that as older workers retire, the Australian public service could lose nearly a quarter of its workforce. The Federal Treasurer has urged the population to delay retirement and has pledged legislation to counter any age bias.

But will people have a choice in the matter? Age discrimination still makes it extremely difficult for older people to obtain and retain employment.

Age Discrimination

Age discrimination and compulsory retirement are unlawful in NSW.

Section 49ZV of the Anti-Discrimination Act, 1977, makes it unlawful for a person:

- (a) to retire an employee from employment, or
- (b) to require an employee to retire from employment, or
- (c) to threaten to retire an employee from employment, or
- (d) to engage in conduct with a view to causing an employee to retire from employment, on the ground of an employee's age.

In a case that went to the Tribunal Mrs. G. claimed she had been compulsorily retired because of her age. She had worked for the company for six years but it claimed that she was inefficient, incompetent and the office was overstaffed.

Continued on page 4

From the President



In this issue of ET the wide variety of ways the Board is addressing and increasing awareness of discrimination and harassment issues is highlighted.

The new procedures recently developed for dealing with complaints in a more efficient and timely manner are outlined.

The ADB enquiries and conciliations branch is endeavouring to progress all complaints in the most effective and efficient manner, balanced of course with a commitment to fairness and sensitivity to the concerns of all parties. The new procedures have greatly reduced the amount of time cases are taking to complete.

Since January 2004 we have aimed to have 80% of cases completed within six months of receipt of the complaint.

In producing and launching *Unfair Treatment... What to do* the Board is continuing its vital work of assisting people to tackle unfair treatment and increasing awareness of the role the Board can play in that process.

The need for organisations to remain vigilant and continually update their knowledge is again highlighted in the conciliations and case law highlighted in this issue of ET.

Stepan Kerkyasharian AM

Unfair treatment

What to do

The booklet, *Unfair Treatment... What to do...* was launched by the Attorney General, the Honourable Bob Debus as part of Law Week. It has been designed to inform people with intellectual disabilities of their rights within the community and workplace, to suggest strategies they could employ to ensure they are dealt with fairly and equitably, and how to lodge a complaint at the ADB if the strategies and suggestions are not successful.

The President of the Anti Discrimination Board, Mr Stepan Kerkyasharian, in his welcoming speech expressed his pleasure in the booklet as it clearly represented part of the mandate of the Board, namely to assist people to deal with discrimination by suggesting strategies they might employ, while allowing them to understand they can lodge a complaint at the ADB. He pointed out that in the past four years there have been over 70 complaints from people with intellectual disabilities at the ADB.

As Robert Strike, the Chair of the Council for Intellectual Disability, stated in his speech, "people with intellectual disabilities are not asking to be treated any better than anyone else; we are just asking not to be discriminated against." He went on to say that he felt the booklet would assist people in speaking out when they felt they had been treated unfairly.

The Honourable Mr Debus spoke of what a useful and worthwhile publication it was as it gave "real, practical and down to earth

assistance to citizens of NSW" and this was reflective of the core of the work the staff at the Anti-Discrimination Board do on a daily basis with passion.

He went on to say that the book was invaluable, being well illustrated, easy to read and in plain language. It also assisted in addressing the complacency that develops within our society towards issues such as discrimination of a type that does not attract publicity.

Mr Stepan Kerkyasharian, the Honourable Mr Debus and the Mr Robert Strike each thanked those who were contributors, models or members of the steering committee for making the book as successful and focused as it is.

For more information on obtaining a copy of the booklet please contact Lian Boyce on 92685555.



L to R: Robert Strike, the Hon Bob Debus and Stepan Kerkyasharian at the launch of *Unfair Treatment... What to do*



Speech by the Hon Bob Debus at the launch of *Unfair treatment ... What to do*

It is a great privilege for me to be here today to launch this very useful and worthwhile publication.

The public too easily forgets how much of the work of the staff of the ADB consists of giving real, practical and down to earth assistance to the citizens of New South Wales.

These may not be the kind of cases that grab sensational headlines or result in High Court judgements; but they make a very real difference to the quality of life of those who come to the Board for assistance.

The person with an intellectual disability who is refused service in a shop; the Aboriginal person denied rental accommodation; the older person denied a job interview.

The staff of the ADB provide advice and support to all these people on a daily basis. I know that

sometimes it is stressful and draining work, and that cases where no resolution is possible loom larger than the Board's successes. But the staff are to be congratulated for the passion that they bring to their work.

In some ways, the ADB – which has done pathbreaking work over decades – is the victim of its own success. People become complacent and believe that the hard yards in anti-discrimination work have already been done. I do not scruple to confide that it is a ceaseless project of mine to convince my own colleagues, not least the Treasury, that the work of the ADB is never done, that discrimination continues to blight the lives of many of our citizens on a daily basis.

Which is why the booklet we are here to launch today is so invaluable. There has been a great deal of community consultation and participation in the development of this booklet.

And this is evident in the high



quality of the ultimate product. The booklet is easy to read, well-illustrated and in plain language.

It is crucial that we make every effort to ensure that every citizen understands his or her rights and responsibilities under the Anti-Discrimination Act.

It is with great pleasure that I launch this booklet... *Unfair Treatment... what to do*

Age Old Dilemmas

Continued from page 1

There was a trainee in the office whose traineeship was due to end soon after Mrs G. lost her job. She said that the Managing-Director told her "I think you should consider early retirement. We want to keep the young one". He also allegedly said to the trainee "Annette is getting older and her health is not good. We want someone younger. You can do the same job that she did". The Managing Director denied this.

The tribunal decided in favour of Mrs G. It rejected the employer's claims that the office would be overstaffed and that Mrs G. was inefficient or incompetent.

As no other justification for her termination was established, the Tribunal awarded her \$12,499.95.

Goodworth v Marsdens Motors Pty. Ltd. (No 1) [1996] NSWEO; EOC 92-837.

But what if you're not as quick as you used to be?

In another case Mr G. (no relation to Mrs G.) was a butcher. He worked for the same company for over 28 years. Then, he claimed, it tried to get him to retire.

His employer said he was "slow" and had trouble managing his workload. Mr G. was transferred, this reduced his overtime and income.

The employer argued that if Mr G. had stayed at the shop, he would have been sacked for slowness. It had allegedly arranged the transfer to try and keep him in employment.

The Tribunal found that the

transfer was aimed at causing the complainant to retire because of his age. It didn't believe he was transferred for being too slow.

It said it was not enough to allege slowness: "A person may well be slower than another but not so slow as to put his employment in jeopardy". Mr G. was awarded \$14,139.33 in damages.

Gilshenen v PD Mulligan (Newcastle) Pty. Ltd. (1995) EOC 92-781.

In a case involving Australia Post, retirement was suggested in relation to disability. As part of its change from "a public service over the counter type of organisation into a more retail oriented" one, Australia Post banned workers sitting on stools. It said stools were an OH&S matter because people might trip over them.

Ms D. needed to sit on a stool because of osteoarthritis, varicose veins & heel spurs. She was put on compulsory sick leave and asked when she would retire.

She claimed disability discrimination

The tribunal decided that Ms D. could do the inherent requirements of her job.

It wasn't impressed by the OH&S matter, pointing out that over 10 years, no one had ever tripped on Mrs D.'s stool. Providing a stool was, it said, a reasonable accommodation for her disability. Furthermore, asking about her retirement was "confrontational" and demonstrated a view that she was not the kind of person

considered suitable to serve behind an AP counter.

Daghlian v Australian Postal Corporation FCA 759 32/7/03

Age has nothing to do with it.

Apart from a few exceptions (see next page) age, by itself, is not relevant to the question of whether or not a person is the best applicant for a job or any other workplace benefit. Factors such as health, experience, availability and qualifications may be, but decisions should not be made on the basis of chronological age.

In another case, the complainant applied for a job as a pilot with Qantas.

Applicants were assessed on flying experience, education and age. Qantas argued that an older pilot might work for a shorter period of time and Qantas would have less time to recoup money spent on training. Qantas submitted that it was reasonable to take age into account.

But the Tribunal held:

"... on the principles of economic rationalism, it is reasonable, certainly where there is a costly training programme involved to take age into account in any selection process, but the Act provides no exceptions for economic rationalism..."

Qantas was ordered to consider the complainant's job application without taking his age into account. It was also ordered to revise its selection procedure.

Blatchford v Qantas Airways Ltd. (1997) EOC 92-888

Proving it

To succeed in a complaint of age discrimination, however, you have to have enough evidence to satisfy the tribunal that, because of your age, were treated less favourably than others in the same or similar circumstances.

Mr P. taught at a high school where student numbers had fallen and three teachers had to be transferred. He was nearly 54 and alleged that he was nominated for transfer because of his age. Each of the teachers transferred were the oldest in their respective faculties.

The Tribunal heard that all staff, excluding the Head Teacher, were considered for transfer. The Head Teacher prepared a profile of each teacher for the Principal. The Principal then made his decision based on the profiles, his own knowledge of the teachers, and further discussions with the Head Teacher.

The Tribunal decided that Mr P. was not treated any differently than a person not his age in the same or similar circumstances. It found that he was nominated in accordance with the Department's Guidelines which did not have any age requirements.

Plancke v Director General, Department of Education and Training [2001] NSWADT 137

Never let them say you're over the hill

Just as people with disabilities are entitled to reasonable accommodations to enable them to fulfil the inherent requirements of a job, so the law does not expect older workers to retain the vigour of their youth.

The Lightning Bolt company sacked two workers, allegedly to cut costs, then employed two younger men. The tribunal said the dismissals were based on age and associated characteristics, such as lack of fitness.

The company appealed. It said it wanted to employ people who were ambitious and who could be part of a trained pool eligible for promotion. The Supreme Court, however, agreed with the tribunal. It said it doesn't matter why the

company dismissed the workers, if they were treated differently because of their age.

Lightning Bolt Co. Pty. Ltd. v Skinner & Anor [2002]

Exceptions

There are exceptions to the general rule that a person cannot be treated less favourably than others in the same or similar circumstances because of their age. Under Section 49 ZYR of the Act, it is not unlawful to provide services and programs to people to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities. Other exceptions include:

- Provision of insurance (s.49ZYT)
- Credit applications (s.49ZYU)
- Safety procedures (s.49Zyv)
- Sport (s.49ZYw)
- genuine occupational qualification (s.49ZYj)
- voluntary retirement or severance schemes (s.49ZYk)

Some of these exceptions can prove to be almost insurmountable barriers to the continued participation of older people in the workplace. In an effort to test the limits of these exceptions a barrister argued that the Barrister's Sickness and Accident Fund's refusal to cover people over 70 was age discrimination.

He argued that the exception for insurance companies was limited to the "terms" on which insurance was provided not a refusal to provide it.

The tribunal said that the exception did cover refusal to insure and in this case refusal was based on actuarial data and was reasonable.

Leslie v Barrister's Sickness & Accident Fund Pty. Ltd. [2003] NSW ADT 216

The future

Anti-discrimination legislation won't, by itself, provide a cure for age discrimination. There will have to be a significant change in attitude on the part of both employers and employees to the benefits of keeping older people in the workforce. The Business Council of Australia and the Australian Council of Trade Unions, in a joint report, described some necessary changes:

- A widespread understanding of anti-discrimination legislation and its implications
- Retirement policies that encourage, not discourage, staying at work
- An integration of government policies, and
- "far-reaching cultural change"

Another popular suggestion is phased retirement, allowing people to gradually reduce their hours in the workforce.

Meanwhile, some are quietly confident that, as more baby boomers approach retirement age, commerce and industry will quickly realise that they can't do without them!

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

Who's Complaining

All about the ADB Enquiries and Conciliation Branch

The Enquiries and Conciliation Branch, along with the rest of the Anti-Discrimination Board was restructured in August 2003. The number of staff in the Sydney office was reduced by the restructure, with two positions moving to the Regional offices. The reshuffle of staff has been implemented in the Wollongong office, but is yet to be completed in the Sydney and Newcastle offices. This process should be finalised within a few months. With these changes, it was imperative that the Board's complaint handling process also change in order to meet the

continuing demands of the Board's functions.

The Branch has developed and implemented ways to deal with complaints in a more efficient and timely manner. Much was drawn from the experience of the Backlog project that was operating in 2002 and previously. Since January 2004, our aim is to have 80% of files completed within a six month period from the date of receipt of the complaint.

The Complaint handling process adopted in the Sydney office in January 2004 can be described as

three stages: an Intake stream, an investigation/conciliation stream and the Review stream. As with any complaint handling process which requires constant assessment and analysis of the material gathered, the stages are not intended to be fixed or mutually exclusive. Provided the complaint is within jurisdiction, a decision to refer a complaint to the Administrative Decisions Tribunal, to conduct a conference or refer a complaint can occur without having to go through each stage of the process.

In general terms, the Intake team undertakes the first contact with clients, clarifies any jurisdictional or factual issues and starts the investigation process. The Intake team deals with the more straightforward cases, as determined by the Manager on assessment of the new complaints. Cases may have a date set for conciliation conference with the first notification to the parties. The Intake team will progress the file as far as possible up to the point of conciliation conference or consideration for referral or declination. The file will be looked at by the Review Team to make the appropriate decision (see below).

Files in the general investigation/conciliation stream follow basically the same process as the Intake team. The difference is that one officer will (as far as possible) conduct the matter through-out the whole process. The allocation to a particular officer is made by

Chinese Delegation visit ADB

The President of the Board welcomed a delegation from the Ministry of Justice in China on 25 March. The delegation, hosted by the Human Rights and Equal Opportunity Commission, was visiting to gain knowledge of Australian methodologies and programs to raise public awareness and educate citizens regarding their legal and human rights, with particular emphasis on the rights of women, children and ethnic minorities.



During their visit to the ADB, the AD legislation was briefly outlined and the complaint and enquiry process was explained. The nature and types of education the Board offers and the range of publications was also outlined to the delegation. The Board's management, in turn, learned about methodologies and programs being implemented in China. There was a great deal of questioning and discussion, keeping the translators very busy.

Some of the other agencies visited by the delegation were the Legal Aid Commission, the Public Interest Advocacy Centre, the National Children's and Youth Law Centre, the Attorney-General's Department.

Review of videos from Corporate Expressions Pty Ltd

The Power of Mentoring

the Manager, taking into account the complexity or sensitivity of the case.

The Review team, which consists of the Conciliation Officers, receive files from the Intake team when the complaint has been investigated and requires an assessment to determine the final steps. The Conciliation Officer reviews the file and makes their own assessment of the appropriate action to be taken. This may be a recommendation to decline or referral to the Tribunal, or that we should conduct a conciliation conference. The Conciliation Officer will then undertake the file to completion.

These new procedures maintain a degree of flexibility for the handling of the complaint so that the most appropriate officer is allocated the complaint at any stage in the process. The Branch endeavours to progress all complaints in the most effective and efficient way, balanced with a commitment to fairness and sensitivity to the concerns of the parties. At the time of writing, the number of complaints received by the ADB was outnumbered by the number of complaints completed. This has given us further capacity to attend to complaints more quickly. We have found the process to be very effective, and greatly reduced the amount of time that files stay in the system. We hope to attain and sustain our target time frames by January 2005, and will monitor and improve on processes in the meantime.

A 26 minute video, written and produced in Australia illustrating the major principles of Mentoring. Mentoring is defined as 'a partnership where the Mentor shares time, skills and experience with another in an open and honest, risk free environment'.

The video follows three mentoring scenarios, one that does not get off the starting blocks due to a lack of understanding by the mentor of the role. The second, shows a manager /subordinate mentoring and the third shows peer mentoring. Simulated workplace situations are used to examine interpersonal communication styles and communication traps. Cross gender and cross cultural examples are used and pause breaks with highlighted discussion points help break up the pace, allow participant reflection and the reinforce concepts. Video program includes a trainer's guide.

Coaching for Improved Performance

This video — written and produced in Australia — examines, through a series of scenarios, a middle level manager's coaching skills with three of his staff. A performance issue is examined and in each case the interpersonal skills and communication techniques required to effectively manage each situation is demonstrated. Examination of performance indicators for each of the three staff help highlight the need to address all performance criteria rather than trading off strengths and weaknesses. Pause breaks and list points are used to draw out and highlight the skills and allow participant reflection.

Running time 24 minutes

For more information about these videos contact:
Corporate Expression Pty. Ltd.
PO Box 1077 Noosa Heads
Queensland Australia 4567
Tel: 07 5455 6955
www.corpexpress.com.au



Legal developments

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

Flekac v Australian Cable and Telephony Pty Ltd

Parental (carer's status), impairment, marital status & serious performance issue

19 December 2003

Ms Flekac started work at Australian Cable and Telephony Pty Ltd (AC&T) as a casual in March 2002. Ms Flekac is a single mother with an 11 year old child. She signed a contract on starting with AC&T that provided that her hours were subject to change, on reasonable notice, to meet business requirements. Initially Ms Flekac worked an eight hour shift which ended late in the evening; later her shift changed to normal business hours ie 8.30 to 5, then from 9–4. Over a period of three weeks in August/September 2002 Ms Flekac had some time off due to influenza - seven out of 15 working days; medical certificates were provided for all her absences.

With effect from 11 September 2002 (and while she was on sick leave) Ms Flekac's rostered shift was changed from 9am to 4pm to 4 pm to 9pm.

On her return to work on 16 September 2002 she met with her supervisors and explained that the change in her shifts meant it was difficult for her to arrange child care. During that meeting a serious performance issue was raised that had become apparent

during the employee's absence on sick leave. Ms Flekac was informed that, pending the outcome of the investigation into the matter and providing she was still employed, her supervisor would attempt to change her shifts to accommodate her childcare needs.

After that meeting Ms Flekac's employment was suspended pending the investigation. On 9 October 2002 her employment was terminated.

Ms Flekac alleged that AC&T directly and indirectly discriminated against her because of her parental and/or marital status and because of her impairment (influenza) by changing her shifts and then by suspending and subsequently terminating her employment. Ms Flekac also alleged less favourable treatment in the way in which her work was supervised.

Findings

The Victorian Civil and Administrative Tribunal (VCAT) found for Ms Flekac on one basis only, that of impairment by changing her rostered shifts.

In evidence AC&T said the reasons for the shift change were Ms Flekac's illness and the fact that on the 9–4 shift there was only one employee for the first part of the shift which meant it was difficult on short notice to arrange someone to cover it. There were more employees on the later shift which meant it was easier to cover in case

of illness. There was also evidence that the person who made up the rosters accommodated the needs of those who gave her notice that they would be unable to work their particular shifts, for example, because of examinations or other personal circumstances.

The VCAT found that a substantial reason for the treatment of Ms Flekac was her periods of (legitimate) absence due to illness and assumptions made by AC&T that those absences would continue. It found that AC&T treated her less favourably than it would have treated other employees absent for legitimate reasons, other than illness, being reasons accepted by the company. The change was made with immediate effect and the employee had no chance to discuss the change with her employer. Her contract required that reasonable notice be given but there was none.

In regard to her claim of discrimination on the basis of her parental status or status as a carer, the VCAT found no evidence the rosters were changed because of Ms Flekac's status as a single mother hence there was no direct discrimination. It also found the requirement to work the new roster was not indirect discrimination because Ms Flekac was not able to show that it would have been impossible for her to make alternative childcare arrangements.

It also found that while many aspects of the process whereby Ms Flekac's employment was terminated were unsatisfactory, the reasons for the termination of her employment were not to do with either her impairment, her parental (carer's) status or her marital status.

Accordingly, Ms Flekac was successful on only one ground — her claim of direct discrimination

on the basis of her impairment by changing her rostered shift. She was unable to adduce evidence of any financial or emotional loss due to the change in her roster but did seek an apology from the company. This was the order made by VCAT - that the company apologise for the inconvenience caused to Ms Flekac by having to alter her childcare arrangements at short notice in order to attend for work at the new time on 16 September 2002.

Notes

The *Victorian Equal Opportunity Act 1995* sets out a number of attributes on the basis of which discrimination is prohibited. While not identical to those of the *Anti Discrimination Act 1977 (NSW)* they are more or less equivalent to discrimination on the ground of marital status (Part 4), disability (Part 4A) and responsibilities as a carer (Part 4B).

ADMINISTRATIVE DECISIONS TRIBUNAL

Zraika V Commissioner of Police, New South Wales

Disability Discrimination

7 April 2004

Mr Zraika has a visual disability — loss of visual acuity or sharpness of vision- which is not correctable by wearing glasses. In September 2002 he applied for employment with NSW Police. His own doctor certified that he was capable of performing the activities of a recruit and the duties required of an operational police officer. The application also required he undergo a visual acuity test. On the basis of his score in that test his application was rejected because he did not meet the department's medical standards for entry into the service.

Findings

Mr Zraika succeeded in his claim of disability discrimination and was awarded \$10,000 compensation.

By agreement between the parties, the case turned on section 49D(4) of the ADA ie “inherent requirements” and “unjustifiable hardship”.

In this situation the onus is on the Respondent to show that the exception applies — section 109 of the ADA (Proof of exceptions).

The Tribunal looked to previous cases when considering that defence and said the respondent has to:

1. determine the inherent requirements of the position in question;
2. determine whether the applicant with a disability is able to perform those inherent requirements without assistance; and
3. if the second inquiry (re assistance) results in a finding adverse to the person with a disability, the employer must determine whether the applicant may be able to carry out the inherent requirements with a level of assistance which does not impose an unjustifiable hardship on the employer.

While it is the employer's obligation to determine the inherent requirements of a particular position, the employer's own statement is not conclusive. It must be able to satisfy the Tribunal that it has made those determinations (ie that the applicant could not perform the inherent requirements without assistance and that he could not perform the inherent requirements without a level of assistance that would impose an unjustifiable

hardship on the Respondent).

The Respondent failed in defending its action because it could not satisfy the Tribunal on either of those matters —inherent requirements and unjustifiable hardship.

It is not sufficient for a respondent to simply assert as an inherent requirement that the person must be able to perform the duties safely — what those inherent requirements are must first be determined, then an assessment made about whether the person with the disability is capable of performing them safely.

The only evidence about the Respondent's determination of the inherent requirements were entries on the medical professional suitability application — these were too broad and too general to be an adequate description of the inherent requirements of an operational police officer;

Basically, the Respondent had not met its threshold obligation of proving he had appropriately identified the inherent requirements of the position of an operational police officer **at the time** the complainant's application was rejected. Even if it had, the Tribunal identified three reasons why the Respondent did not satisfy the Tribunal that its conduct fell within the defence:

1. the determination must be made taking into account the person's past training, qualifications and experience relevant to the particular employment. There was no evidence to suggest this had been done despite evidence on the Complainant's application form that he had previously performed jobs that also required a high level of visual acuity.

continued on page 10

Conciliations

Example of a complaint declined as lacking in substance

The Complainant alleged that they were discriminated against on the grounds of disability and race in the area of employment. The complaint related to two or more distinctly separate events.

Alleged disability discrimination

The Complainant alleged that at the end of a non-work related heated disagreement with a co-worker and former friend, a derogatory comment was made about the Complainant's worker's compensation history.

Alleged race discrimination

The Complainant alleged that a comment made by the same co-worker in their common ethnic language was race discrimination.

The Complainant agreed that the statement was not made to them or about them and had not been offended by the comment prior to lodging the complaint. The complainant was not able to provide specific details about the circumstances in which the statement was made, or the name/s of people who may have witnessed the statement being made.

In its response to the complaint the Respondent company advised that it had investigated the allegations. The Respondent indicated that the alleged perpetrator (co-worker) while not denying that the argument had taken place, did deny making the specific comment attributed to them. The Respondent was not able to find witnesses who had heard the comment. The Respondent arranged for the parties to meet with a mediator in an effort to repair their working relationship.

“unjustifiable hardship”. Where an employer wishes to rely on the inherent requirements defence it must direct her or his mind to that question at the time the job application from a person with a disability is rejected;

Orders

Compensation and an order that the Respondent to take all necessary steps to determine the Complainant's application without reference to the existing standard for visual acuity.

The alleged perpetrator offered the Complainant an apology for anything that was said during the argument that had upset them. The apology was not accepted.

Outcome

After investigating the complaint, the President decided that the complaint was ‘lacking in substance’ for a number of reasons.

1. That the Complainant was unable to offer any evidence to corroborate the claim that the comments were made.
2. That even if the Complainant was able to prove that the comment was made, it is unlikely, being aware of all of the circumstances, that the comment about the

Continued on page 11

ADB Staff Profile Belinda Munn

Belinda Munn is the Board's Senior Workplace Relations Consultants in our Newcastle Office, that is, when she is not “on the road” in the northern parts of NSW.

She has a background in behavioural and social science. Belinda has worked as a trainer and small group facilitator across a diverse range of educational settings ranging from working within maximum security correctional facilities to community services and schools and universities.

Recently, Belinda's comprehensive knowledge of workplace equity issues and her enthusiasm for this area has seen her work in collaboration with local government, heavy industry and the hospitality sector in achieving their goal for a harmonious and productive workplace.

Legal Developments

Continued from previous page

2. the use of one particular visual test as a ‘standard’ for applicants to meet is not sufficient. The Respondent must determine the degree of risk to others caused by the Complainant's visual impairment and the consequences of any such risk being realised;
3. the Respondent has not satisfied his burden of proof about the second limb of the inherent requirements test ie

Complainant's Worker's Compensation history, would amount to unlawful discrimination.

3. In relation to the comments with racial connotations the race discrimination provisions of the act only allow a person to make a complaint about harassment, if they have been subjected to a detriment. The Complainant acknowledged that they had not suffered a detriment because of the racial comment.

When a complaint has been declined as lacking in substance the Complainant has a right to have the matter sent to the Equal Opportunity Division of the Administrative Decisions Tribunal for a hearing. In this case the Complainant did not ask the President to do this, recognising that the Respondent Company had dealt with the complaint in an appropriate manner.

Case declined due to deed of release

The complainant, a young man worked part time in a kiosk. He was gradually given less shifts until he was virtually not working. He said his manager had told him he was too slow and that she did not like to employ males. After contacting the company involved the complaint was declined as the

complainant had signed a deed releasing the company for any past and future employment related claims in settlement of an unfair dismissal claim against the company.

Carers' Responsibility

The complainant was employed as a team leader in a large company for a couple of years before taking maternity leave for a year.

During her absence, there were some changes at the company. Just prior to her return, she made contact with the company and was told that she could only return to her position full time, not part time as she had requested. She was offered lower grade positions on a part time basis which she said would result in a substantially lower income and professional disadvantage. At this stage she says she was told that her old position did not exist due to a restructure and the full time position she was being offered was of a lower status than her original position.

The complainant resigned her position and began retraining in an alternative career. The matter was resolved prior to a conciliation conference being held by negotiations through the Board. The respondents paid the complainant \$12,000 plus \$3,000 for training for the alternative career.

ADB Staff Profile

Lesley Coombs

Lesley Coombs is the Senior Workplace Relations Consultant in our Wollongong office, covering the Illawarra, south coast, and southeast rural areas.

She brings to her training an extremely useful blend of skills and experiences from 25 years working in human rights, management, and education across the public, private and community sectors. She has been a manager, run her own management consultancy, lectured in and developed tertiary management courses. She is skilled at bridging gaps between conflicting views and divided groups.

At the ADB, she has trained a diverse range of workplaces, both management and staff, and advised boards of management, on policy and procedures to enhance discrimination and harassment free work environments.

She has tertiary qualifications in management, adult education and social sciences.



Worried that you're not up on the latest developments in discrimination law?

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

For more information contact:

Sydney: Lesley Ashwood on (02)9286 5520

Wollongong: Lesley Coombs on (02) 4224 9960

Newcastle: Belinda Munn on (02) 4926 4300

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, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

Where we are

Sydney

Level 17, 201 Elizabeth St, 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>