



Equal Time

Number 58 November 2003

CONTENTS

From the President	1
Work and life on collision course	2
Methadone addiction a disability	2
Disability discrimination and the law –NSW experience 1993-2003	4
Avoiding the 'hot potatoes' – recent cases that affect employers	6
Legal developments	8
Conciliations	10
Helping the Board's Outreach program	12

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

Some discrimination issues in the workplace are very complex, and it is hard for employers to be sure they are doing the right thing. See page 6 for information about some 'hot potatoes'.

From the President

Since the last issue of Equal Time, the Board's new structure has been set in place. This comprises three branches – education services, conciliation and enquiries, and liaison and support. This structure reflects the core business of the Board and will provide an effective framework for staff to perform its crucial functions.

A recent analysis of our complaint statistics shows that the number of complaints waiting to be resolved has been significantly reduced in the last year. On 28 November 2003 there were 897 complaints currently active in all offices of the Anti-Discrimination Board, which is approximately 300 less than the number at the same time last year.

The main reason for this is the excellent work done by staff of the Board's complaints branch to implement strategies that have streamlined the process of complaint handling and reduced the waiting time for conciliation. There has also been a slight reduction in the overall number of complaints received.

In 2004 we will be expanding our training program for employers and service providers, particularly outside Sydney. Our education services team is already well known for its lively and informative training program covering all aspects of anti-discrimination law.



Our Workplace Relations Consultants run regular programs throughout the year, as well as conducting in-house sessions which are tailored to meet the needs of individual employers, and courses on topics of current interest or importance.

We also remain active in providing training for community members and their advisors about their rights and responsibilities under anti-discrimination law. Our Aboriginal and Torres Strait Islander Outreach team play a particularly important role in making sure their community is aware of the mechanisms at their disposal to combat discrimination.

Stepan Kerkyasharian AM

Work and life on collision course

Household patterns in Australia are changing. A quarter are now single-person households, and in many families couples work while they have children at home. At the same time, activities that were once the province of women at home are increasingly provided by the market, and some forms of market work are now done at home, or in new ways. And men's participation in market work has steadily declined, while women's has increased.

According to Barbara Pocock, Director of the Centre for Labour Research at Adelaide University, these changes have not been mirrored in compensating changes in the workplace and related institutions. This creates a 'collision' between the changing and unchanging spheres.

Pocock examines this in her book *The Work/Life Collision*. She uses the results of qualitative surveys on work and households from the Australian Bureau of Statistics, the Australian Workplace Industrial Relations Survey and the Household, Income and Labour Dynamics in Australia (HILDA) survey (Melbourne Institute 2002), illustrated with personal voices.

The most potent illustration of the work/life collision is the position of mothers. Pocock argues that there are 'mother wars' between working and stay-at-home mothers, with many mothers from both groups feeling criticised for the 'choice' they made. She also looks at why some mothers feel like they have to go back to work despite feeling guilty about it.

Pocock reports that changing work practices, especially longer working hours, are making it more difficult to sustain loving relationships. Women are frustrated at not being able to satisfactorily fulfil the roles of paid worker, partner, mother and domestic worker on an ongoing basis, and there is considerable tension around the issue of housework.

As well as affecting love and intimacy, long hours have other consequences for families. The book contains disturbing stories of stressed husbands, wives who build peripheral paid work around their partner's long hours and children who hardly ever see their fathers.

Pocock examines a number of regulatory options to deal with the long hours issue, such as reducing standard weekly hours, preventing unpaid overtime and expanding other forms of leave. However, these need to be supported with acceptance from employers, who may need to take on extra staff, and workers, who may have to accept a pay cut.

People with caring responsibilities often find part-time work provides a solution, but this introduces other issues. Part-time work is becoming more common, but is often linked to poor job security, lower rates of benefits such as training, less opportunities for promotion, and extra unpaid hours.

Working part-time is often not a choice but a necessity because of lack of access to childcare. Pocock believes minimal changes from employers such as giving some flexibility in hours, days, and shifts

may help carers cope with unpredictable family needs, but this will require a big mind shift on the part of employer groups and traditionally male-dominated unions.

The biggest collision between work and care exists when a child or dependent is sick. The personal stories show the difficulties parents face when their children are sick, especially when they don't have family support. If such situations are satisfactorily resolved, this usually results in reduced stress for the employee, higher commitment, lower turnover and less loss of human capital.

Finally, Pocock looks at possible solutions to these problems in Australia, in the context of a society where there is strong institutional resistance to women returning to the workforce. She suggests the adoption of a more life-cycle approach to labour, with more integration of paid work and caring responsibilities, and more choice. She also suggests that the culture of long hours should be addressed with more quality part-time work.

As well as being of interest to the policy makers, this book provides a good insight to the problems faced by workers with caring responsibilities, and makes valuable suggestions to employers about increased job flexibility.

Work/Life Collision: What work is doing to Australians and what to do about it

by Barbara Pocock

The Federation Press, Sydney, 2003

Methadone addiction a disability

A recent case before the Administrative Decisions Tribunal has ruled that addiction to methadone constitutes a disability. The complainant, a labourer with the Botany Bay Council, alleged he was forced to resign his position after his addiction to methadone was publicly revealed at his workplace.

The complainant had been on a registered methadone program for over four years. His employer and colleagues were unaware of his addiction. In late June and early July 2002, two containers of methadone were discovered and placed in his pigeonhole on display to other staff. The labels on the containers identified the complainant as the prescribed user.

Following this incident, a meeting was held by his employer to which the complainant was barred from attending. At the meeting, his colleagues and managers openly discussed his methadone addiction and speculated on his HIV/AIDS status.

Following the meeting, the complainant was advised that he would be immediately transferred from his workplace to another site. He was not given a reason for the transfer until two weeks later. As he was the only employee to be transferred, the applicant viewed his transfer as a punishment.

On arrival at his new workplace, his new supervisor gave him a needle disposal bucket for his personal use at work, which upset the complainant. Two weeks later,

he was advised that his hours of work had been cut to 28 hours per week, from a prior workload of 56 hours per week.

At the end of July the complainant was rostered for less than the agreed number of hours, as specified in his contract of employment. He did not receive an explanation for the reduction in his hours.

A conciliation conference was held between the Council and the complainant in August. Following this, the complainant again experienced discrimination, which he felt was a result of lodging a formal complaint with the Anti-Discrimination Board. As a consequence of this treatment, the complainant resigned.

After his resignation, he received a letter from the respondent which stated, 'we can only assume you have commenced your claim in order to secure moneys from the Council which you would otherwise not be entitled to'.

The Tribunal was asked to decide on the preliminary issue of whether addiction to methadone constituted an addiction under NSW legislation. The respondent sought to have the complaint dismissed as outside the Tribunal's jurisdiction, by referring to the NSW Attorney General Bob Debus' s Second Reading speech, which stated that 'drug addicts' were not covered by the legislation.

The Tribunal found that the contents of the speech could only be considered if there was an

element of uncertainty in the law. In the case before it, however, there was no ambiguity. After examining recent caselaw and the *Anti-Discrimination (Drug Addiction Bill) 2001 (NSW)*, the Tribunal found that the complainant's addiction to methadone was a disability under s 4(1).

The respondent argued that as the complainant did not display any disabling symptoms during the period of the alleged discrimination, the addiction did not constitute a disability under the Act. The Tribunal found that 'the fact that a person who suffers from a disorder feels "normal" and is able to lead a "normal life" while taking appropriate treatment does not mean that she or he no longer has a disability within the meaning of the Act.'

The Tribunal also found there was a further complaint of imputed disability relating to the presumption of the complainant's HIV status. The Tribunal found that the contents of the Council's letter could be admitted into evidence, as it was not part of the conciliation process, and constituted part of the respondent's discriminatory behaviour.

The Tribunal ordered the matter be listed for resolution at a case conference.

Disability discrimination and the law NSW experience 1993-2003

Ten years ago the NSW *Anti-Discrimination Act* (ADA) covered 'physical and intellectual handicaps', described as 'defects or disturbances in the structure and functioning' of the body or the brain. To come within the definition people had to prove they had a 'defect' which limited them substantially in an area of their life.

The provisions reflected the thinking and language of previous decades and left much uncertainty about coverage of psychiatric and psychological conditions, learning disabilities and conditions such as HIV/AIDS. Amendments to the ADA in 1994 introduced a more comprehensive definition of disability and allowed a 'representative body' to lodge complaints on behalf of a person or group of people.

However, Part 9A of the ADA, which deals with equal employment opportunity in the public sector, still uses the old definition of disability discrimination. In addition, the ADA still allows for discrimination to be lawful if it is necessary to comply with another piece of legislation, such as occupational health and safety laws.

The federal *Disability Discrimination Act* (DDA) does not have a similar provision, but includes a sunset clause for the exemption of discriminatory pieces of legislation. The Anti-Discrimination Board and the NSW Attorney General's Department ran seminars for government agencies to help them identify discriminatory provisions in legislation and decide when to apply for an exemption. Many pieces of legislation were amended as a result.

Disability discrimination complaints

In the past decade the Board has received over 2,500 formal complaints of disability discrimination, as well as many more enquiries that do not lead to formal complaints. Disability discrimination complaints now represent one in five of all complaints lodged with the Board,¹ and the vast majority are lodged by people with physical disabilities.

The ADA has enabled people to argue for their rights, or prevent their dismissal from employment. They have been able to conciliate outcomes that involve changing the design of their job or obtaining equipment that enables them to continue in their job. In many instances employers and other respondents have been willing to amend their policies and educate their staff on their responsibilities under discrimination law.

The bravery of people in taking up issues of discrimination and opening their lives to scrutiny cannot be underestimated. The critical element in many disability complaints is the extent to which the respondent is required to accommodate a person's disability. This means a person making a complaint must generally provide detailed information about the nature of their disability, which may become public if their complaint proceeds to a Tribunal or Court.

This is never an easy thing to do and requires an enormous amount of courage, tenacity and hard work. And

many people with disabilities operate under additional constraints such as illness, ongoing medical treatment, lack of mobility, lack of access to information or the extra time required for everyday tasks, which make the process even more arduous.

Specific disability issues

In the past decade the Board has seen an increase in the number of complaints lodged by people with psychiatric disabilities. They face enormous discrimination in securing and retaining employment, goods and services, education and housing, as do people with intellectual disabilities. The Board is particularly concerned about the high proportion of people with psychiatric and intellectual disabilities in the prison system.

Another issue of concern is discrimination against people living with HIV/AIDS. Our 1994 enquiry into HIV/AIDS discrimination provided an impetus to public policy and education programs to deal with this issue. In 1994 the ADA was amended to make it unlawful to vilify people on the ground that they are, or are presumed to be, living with HIV or AIDS.

The level of condemnation of people with HIV/AIDS has decreased as the public has become better educated on the issue, but the Board is aware of the level of vilification directed at people with other kinds of disabilities. We have recommended that vilification on the ground of disability be added to the kinds of vilification protected under the ADA.

Discrimination against people who have Hepatitis C was identified as a major issue by another public enquiry held by the Board in 2001. Much of the discrimination associated with Hepatitis C is driven by irrational fears about the way in which it is transmitted, and the perceived link with illicit drug use.

The enquiry found that discrimination against people with Hepatitis C is rife in the health care system, which impacts on health outcomes and prevention efforts. It is also common in employment situations, and there are significant issues in the NSW prison system where prisoners do not have access to sterile needles and safe tattooing services.

Amendments to the ADA that came into effect in April 2002 clarify that addiction to prohibited drugs is not considered a disability in the area of employment. People experiencing discrimination on this basis will not be able to bring a complaint under the ADA.

Advances in genetic technology and the use of genetic information also require vigilance to protect human rights. The Board recently examined the extent to which anti-discrimination laws protect people against discrimination on the basis of their genetic makeup. People may be denied employment or have difficulty obtaining insurance because of genetic testing that indicates they may develop a condition in the future. This may deter people from testing even though it may put them in a better position to prevent the development of the condition.

Employment

Many disability discrimination complaints received by the Board relate to employment. These may involve considering whether the person can undertake the inherent

requirements of the particular position, and whether services or facilities that are required by the person would cause unjustifiable hardship to the employer. Employers need to think job design through very carefully to ensure that the stated requirements really are inherent, and how work can be organised to maximise people's access to and progress in the workforce.

Occupational health and safety regulations also require this to be done, and excluding people with disabilities under the guise of OHS is not acceptable, lawful or sensible. Closer examination often reveals there is a solution that means workers with disabilities do not need to be excluded. This is reinforced by several decisions by the ADT and the previous Equal Opportunity Tribunal, which have rejected OHS arguments put by employers.

Goods and services

Ten years on there has been significant progress in access to goods and services, but it is still not always possible for a person with a disability to get the services they require in NSW, particularly with regard to transport and access to premises.

Making a complaint of disability discrimination is of limited effectiveness because the existing provisions of the ADA, while important, do not require a respondent to do all they reasonably can to redress discrimination in the future. The respondent may be able to make out a defence of unjustifiable hardship at the date of the discrimination at issue, and there is little in the legislation to encourage an analysis of how access may be achieved over a period of time.

A better model may be to impose a positive duty to provide access for people with disabilities, with the role of a court or tribunal being to

determine whether this is possible. A defence of unjustifiable hardship could still exist, but courts and tribunals should be able to analyse what could be done to improve access, and, for example, order an action plan to improve access over time.

Industrial context

The past decade has also seen the Board intervening on discrimination matters in several test cases in the NSW Industrial Relations Commission. The Board has argued successfully for a non-discrimination clause in every NSW award, and for the principles dealing with the registration of enterprise agreements to include principles relating to discrimination, including disability discrimination.

We have also intervened in the industrial case that set down the personal carers leave provisions in awards. Most recently, in the State Working Hours Case we argued that the clause dealing with the rights of workers to refuse to work unreasonable overtime must adequately deal with discrimination issues. However, there is still a very long way to go to ensure that people with disabilities have their rights protected in an industrial context.

Education

Another area that requires major attention is the education sector. Despite significant improvements over the past decade there is still a need to tackle systemic discrimination in this area. Many students continue to experience problems with access to educational facilities and programs. Harassment of students with some disabilities continues and much work is still needed for students with disabilities to achieve true equality of opportunity.

Note

¹ In 2001/2002 the Board received 332 disability complaints making up 20.4% of all complaints lodged with the Board.

Avoiding the 'hot potatoes'

Recent cases that affect employers

Making effective business decisions and complying with legislation can be tricky. Laws covering discrimination, industrial relations and occupational health and safety (OH&S) affect the way you approach certain workplace issues. Recent decisions made at tribunals and courts around Australia provide some guidance on how these laws are being interpreted.

Carer's responsibility is a relatively new ground of discrimination. It requires employers to treat employees with carers' responsibilities fairly and to accommodate the carer needs of the employee without causing 'unjustifiable hardship' to the employer.

The business benefits to employers of providing flexibility to employees with carer's responsibilities can be substantial – the retention of experienced and knowledgeable staff, reduced absenteeism or turnover and an enhanced reputation as an 'employer of choice.' The Savings & Loans Credit Union (SA) Limited saved \$45,000 in recruitment costs in one year and reduced staff turnover from 28% to 10% over three years by introducing a variety of flexible work practices.¹

Failure to comply with carer's responsibilities legislation may create costs for an employer. A recent case involved a supervisor who had worked at a dental clinic for 20 years.² After taking maternity leave when she adopted a

child, she asked to return to work part-time and share her supervisory position of charge nurse.

Her employer refused to allow a job-share arrangement and indicated that she must either work full-time as the charge nurse or take part-time work in a lower position. She returned to her position full-time but found it too difficult to manage this while also caring for her child and eventually resigned.

However, the Tribunal did not regard the supervisory and managerial nature of the charge nurse position as inherently unsuitable for part-time employment. It found that the employer had not properly considered the advantages of job sharing and focussed only on the disadvantages.

The Tribunal also held that the employer's initial response to the complainant's request for a job-share situation was a 'knee-jerk reaction' based on a feeling about the position and the fact that it had always been held by someone in a full-time capacity. It found that the reasons advanced by the employer in rejecting the proposal for a job-share were vague, ill-considered, superficial and had no objective basis.

The Tribunal ordered that the complainant be reinstated to her substantive position with retrospective effect and that the employer implement the job-share proposal. Damages of \$12,604 were also awarded.

Other recent decisions have focused on the need for the employer to consider a range of alternatives to accommodate carer's responsibilities such as flexible hours³, job sharing⁴, leave entitlements and working from home arrangements.

In one case, the Tribunal commented that carers' responsibilities were more than just functional duties or a response to a specific need, and encompass the general physical, emotional and psychological needs of the person in need of care.⁵

Preventing harassment of employees with carer's responsibilities is also required. In another recent case, an intelligence analyst was awarded \$54,000 in compensation when she was intimidated, treated unfavourably and ultimately dismissed because she took time off to care for her sick son (see page 8 for more details of this case).⁶

Balancing disability discrimination and OH&S requirements is another issue that has resulted in substantial awards being made against employers. An employer may be within their rights to discriminate against a potential or existing employee with a disability in order to comply with OH&S requirements.

However, this will only apply if they can show that such a decision is *necessary* to comply with OH&S and that no other options are available. It is insufficient that the

other legislation merely authorises or allows the discriminatory conduct.

A NSW firefighter was recently awarded \$40,000 after it was found that the employer had unlawfully discriminated against him on the grounds of a disability.⁷ The employer maintained that because the complainant only had sight in one eye, he was unfit to undertake fire fighting duties or participate in the training offered to other firefighters of his rank, and posed an OH&S risk.

The Tribunal disagreed and said that the respondent had not given any evidence to show that it was necessary for it to discriminate against the applicant on the ground of his disability in order to comply with any specific legislative provisions.

It said that the employer had failed to show that the employee could not meet the inherent requirements of the job and that no real effort was made to comprehensively identify the characteristic or essential requirements of the employment of an operational firefighter.

In another decision, a security officer was awarded \$16,000 after he was dismissed due to an injury that meant he could no longer carry out his duties.⁸ Although the Tribunal accepted that his health posed some OH&S risks, it did not accept that the employer had no option but to dismiss him. It commented that the employer should have considered whether he

I advised an employee that we couldn't consider her for a position due to OH+S requirements.

Now she is threatening us with a disability discrimination complaint.

How do I deal with my Financial Officer's request to work part time after her maternity leave?

It's always been a full time role!

Where do we draw the line with sexual harassment?

Sometimes I just don't know what's reasonable and what's not.

Sound familiar?

Knowing how to deal with certain workplace issues can be tough. The Anti-Discrimination Board has introduced a new seminar session:

'Hot Potatoes' for Employers

to assist employers in responding to some of the trickier workplace problems with confidence and authority.

Our Workplace Relations Consultants are highly skilled in this complex area of the working environment. It is their knowledge and expertise, their training skills and extensive experience that make our training sessions focussed, interactive and highly relevant to the workplace.

For more information, phone Lesley Ashwood, Manager Education Services, or Murray Burke, Senior Workplace Relations Consultant, on 9268 5555.

could have been provided with assistance to carry out his duties and/or to explore alternative ways in which that work was carried out.

These decisions highlight the need for employers to consider a variety of ways to accommodate carer's responsibilities and disability issues in the workplace. The latter also requires a careful consideration of OH&S obligations.

In recognition of the difficulties employers may face in these areas, the Board is offering a new seminar which explores recent case decisions

and their implications for workplace practices. See above for details.

Notes

1. Australian Chamber of Commerce, *National Work & Family Awards* 2002.
2. *Bogle v Metropolitan Health Service Board*, WA EOC 93, 2000.
3. *Song v Ainsworth Game Technology Pty Ltd*, FMCA 31, 2002.
4. *Escobar v Rainbow Printing Pty Ltd*, FMCA 122, 2002.
5. *Gardiner v NSW WorkCover Authority*, NSW ADT 184, 2003.
6. *Evans v National Crime Authority*, FMCA 375, 2003.
7. *Lavery v Cmr of NSW Fire Brigades*, NSW ADT 93, 2003.
8. *Perlidis vs Brambles Security Services Ltd*, NSW ADT 11, 2003.

Legal developments

FEDERAL MAGISTRATES COURT OF AUSTRALIA

Evans v National Crime Authority

Discrimination on the ground of family responsibilities

Date of decision: 5 September 2003

A recent case heard in the Federal Magistrates Court has found that an employer discriminated against a female employee with carer's responsibilities.

The employee, a single mother with a six-year-old child, was employed as an intelligence analyst for the National Crime Authority, now known as the Australian Crime Commission, on a contract basis between 1999 and 2000.

Upon joining the NCA, the complainant was able to transfer her accrued leave entitlements from her previous government employer, which amounted to between six and seven hundred hours. During the course of her contract with the respondent, the complainant took some time off for personal leave, including carer's leave and sick leave, for which she provided medical certificates.

In early July 2000, she attended a meeting with a team manager. At the meeting she was told that she was not 'fulfilling the job on a full-time basis', and advised that if her leave from work continued, her contract would be terminated. She told the manager that the leave she

was taking was already accrued and she was entitled to it. The manager expressed surprise that the leave was owing to her.

Following the meeting, the complainant suffered stress and anxiety, and consulted her doctor who gave her a medical certificate for further leave. A second meeting was held late in July between the complainant and the manager.

During the meeting she was advised that her employment contract would not be continued beyond September 2000, despite the ongoing nature of the work of her unit. The manager also told the complainant that if he had known she was a sole parent, he 'would never have hired her'.

Following the meeting, the complainant alleged the manager asked her if she could 'guarantee 100% attendance for the remainder of her contract'. She advised the manager that she was unable to provide a guarantee that her child would not be ill, and confirmed that she would honour her employment contract in good faith.

A series of meetings then took place between various managers and the complainant. During these meetings, she was again asked if she intended to be at work every day. In the last of the meetings, a regional manager commented, 'I would never have hired you if I had known that you would have a sick child and take so much time off'. The complainant was distressed

and sick as a result of this comment, and on the following day, formally resigned her position.

Supporting evidence was presented from the complainant's co-workers, including a colleague who was also a sole carer. The colleague was also warned that her contract would not be renewed if she took further carer's leave.

The court found that the respondent had discriminated against the complainant on the ground of family responsibilities. The court found that the complainant had not taken any leave to which she was not entitled by her contract, and that under cross-examination, the manager concerned conceded that the leave the complainant took was not excessive.

The court ordered damages of \$25,000 for hurt and humiliation, and damages for loss of wages for approximately \$16,000. The court also indicated that it would be appropriate for the respondent to make a formal apology.

ADMINISTRATIVE DECISIONS TRIBUNAL

Denmeade v Kempsey Shire Council & Ors (NO 2)

Victimisation in employment

[2003] NSWADT

The Administrative Decisions Tribunal has found that an employer victimised a female employee by disclosing a list of sexual harassment and sex discrimination claims made by her to a meeting of her colleagues.

The complainant was employed by the respondent from 1995 to 2000, when her employment was terminated. During this time, the complainant alleged she experienced 13 incidences in which

she was sexually harassed, victimised and discriminated against because of her sex.

The incidents included a male colleague throwing a spider in her face, being subjected to pornographic material depicting naked women displayed in the workplace, being told she was unfit for her position because she was a woman and denied opportunities for promotion and variation in her work duties.

Other incidents included a co-worker saying 'Council's outdoor staff is not a place for women. Women should not be working there', and 'You should wear tighter shirts and shorter shorts'. It was alleged her supervisor made discriminatory comments, including 'A woman's place is in the home chained to the kitchen'.

The Tribunal rejected all of the complainant's claims of sexual harassment and sex discrimination. Although the some of the treatment may have amounted to 'some sort of assault', it did not constitute discrimination on the basis of gender, as the complainant's claims could not be substantiated.

The complainant also alleged she was victimised by her employee and a co-worker after she formally complained about the harassment. Evidence was given that her employer responded to her complaint by commissioning a report on the complaints and calling a meeting of her colleagues. At the meeting, the writer of the report read aloud each of the complainant's allegations to the assembled group.

It was alleged that the meeting was told that 'money, greed and revenge' had motivated the complainant. After the complaints were read, the co-workers were asked to provide further

information. It was alleged that one worker called out 'she's a c...', and that the comment was written on a white board in large letters. Another employee was alleged to have said, 'I told her women shouldn't be working at the depot'.

The Tribunal accepted that the complainant was subjected to victimisation as a result of making a claim of sexual harassment, breaching s 50 of the *Anti-Discrimination Act 1977* (NSW). It held that the decision to 'discuss the matter in a group... was a very poor way of conducting any sort of investigation... If the purpose of the meeting was to get to the heart of the matter she raised, the appropriate course would have been to take evidence from the relevant witnesses individually'.

The Tribunal awarded the complainant \$4,000 in damages for pain and suffering.

FEDERAL COURT OF AUSTRALIA

Daghlian v Australian Postal Authority

Indirect disability discrimination

Date of decision: 23 July 2003

A disabled customer service officer has won a case of indirect disability discrimination after she was forced out of her position because she was not allowed to sit down while working.

The respondent had introduced a new retail concept to their Manly store, where the complainant had worked for 11 years. As part of the new working environment, workers were not permitted to be seated while serving customers or performing retail counter duties. Previously, stools had been provided for front line customer service officers to use when needed.

The complainant, who had osteoarthritis, heel spurs and varicose veins, was refused permission to sit, even intermittently, while serving at the retail counter. The respondent then redeployed her to the corporation's head office in Strawberry Hills, and sought to appoint her to an administrative position, rather than a retail position, at another location in Sydney. After failing to provide her with a position close to the Sydney's northern beaches where she lived, the respondent finally placed the complainant on extended sick leave.

The court held that the requirement to stand at the counter while working was unreasonable, and that the respondent suffered indirect disability discrimination in contravention of s 15 of the *Disability Discrimination Act 1992* (Cth). The court found there was an unreasonable belief by a manager that the respondent was 'not the kind of person appropriate to be any longer serving on a post shop counter of Australia Post'.

The court ordered the respondent to pay the complainant's costs, estimated to be over \$100,000.00. The court also ordered that the matter be relisted to assess compensation, including damages and lost actual and potential earnings.

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 Lesley Ashwood on 9286 5525

Conciliations

Disability discrimination in employment

The complainant applied for employment with a government agency, in a position where some medical testing was required. She had the required tests and in the process it was revealed that she tested positive for Hepatitis C, which she had apparently contracted from a blood transfusion some 20 years earlier.

The complainant supplied the testing information to the respondent and they allowed her to begin training for the position while further tests were done. When this revealed that she was infectious the respondent declined to admit her to the next stage of training, on the grounds that she would be unable to fulfil the full range of duties required of the position.

The complainant lodged a complaint of disability discrimination. She said the respondent should have had a policy on Hepatitis C and told her in the beginning that she would not be eligible. She would then have avoided getting her hopes up, spending several months in training and paying for further medical tests.

The respondent said that they were not prepared to change their decision. The matter was resolved when the respondent agreed to assist the complainant to find a position in a related area where her medical condition would not be an issue.

Sexual harassment in employment

The complainant was a factory worker who said that her supervisor harassed her by asking her out persistently, touching her and making sexual comments to her. She reported this to the factory managers who gave the supervisor three warnings and eventually dismissed him because of his behaviour.

The complainant lodged a complaint of sexual harassment, saying that the respondent had not taken firm enough action against the supervisor as the behaviour continued until he was dismissed. The matter was resolved when the respondent agreed to pay the complainant \$4,000.

Sexual harassment and disability discrimination in employment

The complainant was a young woman who worked as a waitress in a hotel owned by the respondent. She alleged that after she injured her back at work and was off for two weeks, she was given less work and was treated unfairly over an error at the money till.

She also alleged that she was subjected to sexual harassment in the form of offensive pictures, comments about her sex life, unwanted touching and requests for sexual favours. When she reported this no action was taken, and she was advised to fit in and not make an issue of it. Eventually she resigned and lodged a

complaint of sexual harassment and disability discrimination.

The respondent denied the allegations and said that they had followed proper procedure in all their dealings with the complainant. The matter was settled when the respondent agreed to pay the complainant \$5,000 in compensation, develop a policy on harassment and discrimination-related issues and make sure staff were aware of this policy.

Homosexual discrimination in employment

The complainant worked in a branch office of a financial institution. She alleged that she was subjected to harassment and discrimination by the assistant manager in the form of comments and insinuations about her sexual preference.

After an argument in which the complainant swore at the assistant manager, the complainant was allowed to resign from her position in the face of it being terminated. She lodged a complaint of homosexual discrimination with the support of her trade union. She also alleged that the respondent failed to properly investigate her allegation that she was being harassed by the assistant manager.

The respondent denied the allegations and said that there had been ongoing problems with the complainant's poor performance and swearing in both the current office and in another office where she had worked previously.

At the time of making the complaint the complainant had begun working in a different section of the financial institution, through an employment agency. The matter was resolved when the respondent agreed to make the complainant a permanent employee in her current position.

Sexual harassment in employment

The complainant worked as a horticulturalist for a local authority. She alleged that she was subjected to a generally hostile environment, including sarcasm, bad language, dirty jokes and pornography. There were also a variety of occupational health and safety issues in the workplace.

She further alleged that when she complained about this the issues were not dealt with properly, she was ostracised and other staff would not cooperate with her work. She lodged a complaint with the Board and resigned from the position while this was being processed.

The respondent said that they had dealt with the complainant's grievances adequately through an action plan. The matter was settled when the respondent agreed to make an ex-gratia payment of \$5,000 to the complainant.

Sexual harassment in employment

The complainant was an 18 year old man who worked as a kitchen hand in the respondent's restaurant. He alleged that he attended his boss's home one evening in order to drop off some tea towels and was invited to stay for a drink. He said his boss turned the conversation to sexual matters and began to discuss his homosexuality with explicit details of sexual acts he had performed.

He further alleged that when he went to use the toilet his boss had tried to force his way in and asked him to show him his penis. He said that when he was leaving following this incident, his boss had wrestled with him, during which he touched his backside and penis.

The respondent denied the allegations. He said that he was

openly gay, and the complainant was flirtatious and had been asking questions about his sexuality. The complaint was resolved when the complainant accepted an ex-gratia payment of \$2,000.

Disability discrimination in employment

The complainant applied for eligibility for employment in a particular position with the respondent, a government agency. After undergoing visual testing the complainant was advised he was unsuitable for employment in this type of position due to his degree of colour blindness.

With assistance from the Board, the matter was resolved when the respondent agreed to carry out an on-the-job test of the complainant's ability to perform the actual work required. The complainant passed this test and was consequently eligible to be considered for employment.

HIV/AIDS discrimination in employment

The complainant worked as a book editor in a publishing house. He disclosed to his employer that he was HIV positive and may sometimes need to take sick leave if he was unwell or needed treatment.

He said that the respondent initially reacted well, but began to ask questions about his health that he felt were overly intrusive. Eventually he was retrenched and lodged a complaint of HIV/AIDS discrimination when he found an ad for a job which he regarded as similar to the one he had been doing.

The respondent said they had not offered this new job to the respondent because it paid less and they didn't think he would want it. The matter was resolved when the respondent agreed to pay the complainant \$6,000.

Marital status discrimination in employment

The complainant worked as a cleaner with the respondent at various work sites. She alleged that she was discriminated against on the ground of marital status when her employer advised her that she could not work in two particular locations because of her husband's past criminal record.

It appeared that a junior supervisor of the respondent had acted on inaccurate advice. The matter was resolved when the respondent affirmed that the complainant should not have been prevented from working at the locations in question, even though she was provided with alternative work.

The parties agreed that the next available opportunity for relief work at either of the locations would be provided to the complainant. The respondent also undertook to write to one of the locations indicating its intention to provide work to the complainant.

Sexual and racial harassment in employment

The complainant, who is of African descent, worked in a shop owned by the respondent in a country town. She alleged that the respondent harassed her in a number of ways, making sexual comments, negative remarks about a relative who was homosexual, and race-based remarks, for example about her 'carrying pots on her head'.

Eventually the employer dismissed her, saying that there was no longer enough business to continue employing her. The matter was resolved when the complainant accepted an apology from the respondent.

Helping the Board's Outreach program



The Board's Aboriginal and Torres Strait Islander Outreach Program is greatly assisted by the activities of people like John Walford from Collarenebri.

John first became involved with the Board five years ago when he lodged a complaint about a pub in the area that would not serve Aboriginal people. One of the members of the outreach team, Felicity Huntington, subsequently asked John if he would like to become a member of the Board's Aboriginal and Torres Strait Islander Advisory Committee.

Since then, John has been a valuable member of the committee, keeping the team informed about issues in his community. He also plays a very important role in distributing information about people's rights and the role of the Board in his area, and giving out many copies of our publication

'Know your rights', which is targeted specifically at Aboriginal and Torres Strait Islander people.

John was born in Walgett and was brought up by his aunt and uncle after his mother died when he was a baby, with an extended family of 18 brothers and sisters. He worked at cotton chipping when he was young, and then for many years as a rouseabout in shearing sheds.

Since injuring his back while lifting heavy fleeces, John has become a leader of the Aboriginal community in his area. He has taken on an unofficial liaison role with the local police, and drives the Night Watch bus which returns young Aboriginal people home in the evenings and keeps them out of trouble. He is also a member of the Australians for Native Title and Reconciliation Committee.

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

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Level 17, 201 Elizabeth St, Sydney NSW 2000
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ph (02) 9268 5555, fax (02) 9268 5500, TTY (02) 9268 5522
Enquiries/Employers Advisory Service (02) 9268 5544

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Newcastle

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Newcastle West NSW 2302
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Toll free number — 1800 670 812

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

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