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Disability discrimination imbalance

The High Court has endorsed a balanced view to discrimination complaints in accepting that a school is entitled to rely on bad behaviour to exclude a difficult but disabled student¹. Partner Jamie Wells reports.

Test for direct discrimination

Direct discrimination cases have been inconsistent when considering whether there has been unlawful discrimination. In the context of disability discrimination, it is well accepted that direct discrimination involves a disabled person being treated less favourably than a person without the disability, in the same or similar circumstances. The test is easily stated in the abstract. The complicating issue is to decide whether behaviour that results directly from the disability forms part of the disability. If it does, the appropriate comparator is a person not only:

- without the disability; but
- who does not behave in the same way as the disabled person.

In situations where behaviour is the main reason for the less favourable treatment, this issue will usually be critical. If behaviour is taken to be part of the disability, a finding of direct discrimination usually follows. If behaviour is not treated as part of the disability, the result will depend on the way in which other people with similar behaviour would be treated.

A complainant will prefer direct discrimination over indirect discrimination, as the reasonableness of the treatment is not relevant. If there is less favourable treatment, the complainant satisfies the test, even if the result appears unbalanced or unduly onerous. This issue has now been resolved in *Purvis*.

1. *Purvis v State of NSW* [2003] HCA 62

The Purvis complaint

In *Purvis*, a school excluded a student with brain damage that led him to behave badly. The student's behaviour included, among other things, violence towards teachers and other students.

A complaint was made on his behalf alleging disability discrimination. It was argued for the student that, because his behaviour was caused by the disability, it was effectively part of the disability. Therefore, the proper comparison to assess less favourable treatment was between him and a student without the disability (or the tendency to behave in that way). Clearly, the school would not have excluded a well behaved student and success on this point would have justified a finding of direct discrimination.

The High Court decision

After several appeals in the federal courts, the High Court concluded by majority that the argument put for the student was incorrect. Although the reasoning among the majority judges varied, the general thrust was that:

- offensive behaviour could result from a number of causes, only one of which was intellectual disability;
- when comparing the school's treatment of the student with treatment likely to have been meted out to other students, it was inappropriate to disregard the characteristic of offensive behaviour.

In effect, the court must ask whether an ordinary student behaving in the same way would have been treated any differently. In answering that question, the High Court accepted that the disability played no part and the ordinary student would have been excluded as well.

Consequences

The decision is extremely important as it means that cases of this type will need to be argued as indirect rather than direct discrimination. Indirect discrimination occurs if a standard is applied that does not single out any particular class of person but, in the context of disability discrimination, the standard works in practice by excluding a person with the disability.

In *Purvis*, it might have been argued that the school's standard of behaviour discriminated indirectly by setting the standard too high for the disabled student. However, whenever indirect discrimination is argued, the complainant must also satisfy the court that the standard is unreasonable. Had the argument in *Purvis* succeeded, the effect would be to allow these claims

to succeed without the student having to show that the set standard of behaviour was unreasonable.

Although *Purvis* was a disability discrimination case, the same argument should apply to any protected attribute. For example, a requirement that all employees must be available to work full time should not be taken as directly discriminatory of those having family responsibilities. The fact that the need to work part-time often flows as a matter of necessity from family responsibilities is not sufficient. The proper approach is to apply the indirect discrimination test and ask whether the full-time requirement, impacting as it does on those with family responsibilities, is unreasonable. If it is unreasonable, and no other defences apply, indirect discrimination results.

The decision is extremely important as it means that cases of this type will need to be argued as indirect rather than direct discrimination.

This is significant, as it suggests that decisions that do not specifically target a protected attribute are likely to be upheld, as long as they are reasonable.

If you go down to the park today

Partner Julian Riekert discusses a recent case that again demonstrates the limits of pleading public and private safety concerns as a defence to discriminatory treatment.

Background

In *Bellamy v McTavish & Pine Rivers Shire Council*², the complainant, Mr Bellamy, was the tenant of an old school building located in the North Pine Country Park at Kurwongbah, Queensland. He used the building as a workshop for his wooden toy manufacturing business. On a night in July 2001, while at home, Mr Bellamy, who suffers from a bi-polar disorder, suffered a manic episode. His partner, who had not witnessed

2. Queensland ADT [Ref HEA02/53], 7 October 2003

this before, was distressed by his conduct and by what she believed to have been his threat to burn down the schoolhouse factory. She told friends, who told police, who in turn alerted the park's caretaker.

Management action

When the park's business manager, the first respondent Mr McTavish, heard of the episode and the threat, he quickly took steps to have Mr Bellamy banned from the park. His justification for this action was that he believed Mr Bellamy was 'a threat to children and other park users' and park property because of his mental disorder. There was also evidence that, after the Mayor of the Pine Rivers Shire Council intervened to have the ban set aside (after it had run for two months), the business manager orchestrated a campaign of 'cold shouldering' where other park employees were directed to ignore Mr Bellamy and his partner.

Before taking hasty and potentially discriminatory action in response to behaviour that is the product of mental illness, one needs to take professional advice.

The decision

The Tribunal held that:

- there was no evidence at all to make a reasonable person believe that Mr Bellamy's behaviour constituted a threat to any park users, let alone children;
- both the original ban and the subsequent direction to ignore Mr Bellamy had been prompted by Mr McTavish's baseless view that Mr Bellamy's mental condition made him a threat to public safety;
- statements to the contrary made by Mr McTavish during his evidence were both lacking in credibility and misconceived; and
- Mr McTavish's imposition of the initial ban was 'deliberate and nasty'.

The Tribunal awarded Mr Bellamy damages of \$17,000 (\$15,000 for hurt to feelings) and directed that the Shire Council provide him with a formal written apology. A further direction was made that a copy of the decision be sent to councillors and senior officers of the Shire Council as a remedial measure.

Responding appropriately

The case shows that, before taking hasty and potentially discriminatory action in response to behaviour that is the product of mental illness, one needs to take professional advice and make a calm and well-informed assessment of the situation.

A limit on unfair contracts at last?

A recent decision by the Supreme Court of New South Wales takes a much narrower view of the unfair contracts jurisdiction than the Industrial Relations Commission of New South Wales. As Senior Associate Andrew Cardell-Ree reports, this decision may offer employers some assistance in defending an unfair breach of contract claim.

Background

In *Dodds v Premier Sports Australia*,³ Mr Dodds commenced an unfair contract claim before the Commission, alleging unfairness in the operation of the terms of his employment contract. Specifically, Mr Dodds alleged that it was unfair for the contract to permit Premier Sports to withhold a bonus that Mr Dodds claimed was due to him on termination.

Premier Sports commenced related proceedings in the Federal Court of Australia, and those proceedings and the Commission proceedings were transferred to the Supreme Court of New South Wales to be heard together.

Decision

The court found that Dodds was seeking enforcement of a contract, and distinguished that claim from a genuine claim of unfairness – for example, that the termination benefit due under the contract itself was so inadequate in the circumstances as to be unfair. In making this distinction, the court suggests that a claim to enforce the terms of a contract that have been breached does not give rise to an unfair contract claim.

3. [2003] NSWSC 948

The decision does not refer to the earlier decision of the Full Bench of the Commission in *Reich v Client Server Professionals of Australia*,⁴ which considered and expressly rejected the approach adopted here. Based on *Reich*, a party's failure to comply with a term of a contract may involve an unfair contract allowing for a claim to be taken to the Commissioner.

Implications

The approach taken in *Dodds* offers employers hope that having an unfair contract claim transferred to the Supreme Court may widen the range of defensive arguments available and narrow the scope of the claimant's arguments when framing the claim.

Discrimination against carers

The NSW Administrative Decisions Tribunal has handed down the first decision on the carers' responsibilities provisions of the *Anti-Discrimination Act 1977* (NSW).⁵ Law Graduate Louise Keats reports.

Background

Ms Gardiner was a senior manager with the NSW WorkCover Authority. Following WorkCover's decision to move its headquarters to Gosford, Ms Gardiner was informed that she would be required to spend five days a fortnight in Gosford to interact with staff there and attend meetings. She complained that this requirement interfered with the care of her youngest two children, aged 8 and 6. She alleged that WorkCover was in breach of the indirect discrimination provisions in relation to carers' responsibilities.

Tribunal's findings

For there to be indirect discrimination, Ms Gardiner had to show that:

- a rule or requirement had been imposed on her;
- as a carer, she was unable to comply with it;
- a higher proportion of carers than non-carers could not comply with it; and
- it was unreasonable in the circumstances.

Looking first at the existence of a 'rule or requirement', the Tribunal rejected the respondent's submission that a requirement relates only to the regulation of conditions *within* a workplace and not to the location of an enterprise.

In relation to the second element (the inability to comply with the requirement), the Tribunal held that in a practical sense Ms Gardiner could not comply. This was because travelling to Gosford would mean spending less time with her children. She did not have to show that compliance was physically impossible.

Employers should carefully consider the implications of flexible workplace practices for carers before deciding they are not feasible.

The Tribunal also held that the third element of indirect discrimination had been satisfied because all of the managers without carers' responsibilities (who were all men) could comply, whereas all of the managers with carers' responsibilities (who were all women) could not.

Despite these findings, the Tribunal held that WorkCover had not breached the indirect discrimination provisions because the requirement to relocate to Gosford was reasonable. Although Ms Gardiner would spend 10 hours less with her children each fortnight, the Tribunal considered that WorkCover had made considerable efforts to accommodate her situation and, furthermore, that the move to Gosford was a legitimate management requirement.

Implications

Despite the finding that there was no discrimination based on carers' responsibilities in this case, employers should be mindful of this area of discrimination. Cases like Ms Gardiner's and the recent award of \$54,000 (under the family responsibility provisions of the *Commonwealth Sex Discrimination Act 1984*) to a mother who took leave to care for her sick child, demonstrate the potential reach of the carers' responsibilities provisions.⁶

Employers should carefully consider the implications of flexible workplace practices for carers before deciding they are not feasible. The result in each case does not depend on abstract principles, rather on whether the rule or requirement has a legitimate purpose that cannot be equally achieved by a more flexible alternative.



4. [2000] NSWIRComm 143

5. *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184

6. *Evans v NCA* [2003] FMCA 375

Federal Government continues workplace reform agenda

The Commonwealth Government has recently proposed further amendments to its workplace relations legislation. Lawyer John Naughton reports.

Termination of employment Bill

The Workplace Relations Amendment (Termination of Employment) Bill proposes to make full use of the Commonwealth's constitutional power over corporations to broaden the application of federal unfair dismissal laws.

Currently, federal unfair dismissal laws apply only to employees covered by federal awards or agreements (and to employees in the Territories, and in Victoria, which has ceded its industrial relations powers to the Commonwealth). The Bill would apply federal unfair dismissal laws to all employees of constitutional corporations (whether respondents to federal awards or agreements or not), increasing the number of employees covered from about 4 million to about 7 million (or from about 50 per cent to about 85 per cent of the Australian workforce).

The intention is to curtail the current operation of State unfair dismissal laws, reducing the complexity of Australian unfair dismissal laws and decreasing compliance costs for business.

The Bill was previously passed in identical form by the House of Representatives in May 2003, before being rejected by the Senate in August 2003. It seems likely that the Government will have similar difficulty in enacting the Bill this time around. While there may be support for the proposition that maintaining six separate industrial relations jurisdictions in the relatively small Australian labour market is inefficient, there is no consensus that the current federal unfair dismissal laws should prevail over existing State laws.

Having been reintroduced to the lower house on 6 November 2003, it seems likely that the following initiatives within the Bill will again be the subject of vigorous debate:

- limiting the compensation payable to employees of small businesses to three months' remuneration;
- extending the qualifying period for employees of small businesses to access unfair dismissal provisions from three to six months; and
- limiting unfair dismissal claims by employees terminated by reason of redundancy.

Better bargaining Bill

Among other reforms, the Workplace Relations Amendment (Better Bargaining) Bill proposes to amend the *Workplace Relations Act 1996* to ensure that protected industrial action cannot be taken before the normal expiry date of an agreement. The Bill responds to the decision in *Emwest*⁷, where the full Federal Court rejected the argument that entry into a certified agreement effectively precludes all industrial action for the term of the agreement. As the legislation stands, the prohibition does not apply to action in support of a claim not covered by the agreement.

The Bill also proposes to limit the right to take industrial action to only those matters pertaining to the employment relationship. In the *Electrolux*⁸ case, the full Federal Court held that it was legitimate for unions to make claims in relation to matters that were not 'employment matters' as defined in the *Workplace Relations Act 1996*. Since then, the effect of *Electrolux* has been to protect industrial action in support of a claim, even though the resulting agreement does not comply with the requirements for certification.

Further reform?

In addition to these Bills, there are a number of other workplace relations Bills that have already been rejected twice by the Senate, providing double dissolution triggers. It is reasonable to assume that workplace relations issues will again feature prominently in the run-up to the next federal election.



7. *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2003] FCAFC 183 (15 August 2003)

8. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* [2002] FCAFC 199

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