
Vicarious liability for race and disability discrimination in the workplace

BY CHRISTINE FOUGERE

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In a recent decision of the Federal Magistrates Court, Qantas was held to be vicariously liable for the actions of its employees in discriminating against another employee, Mr Gama, on the basis of his race and disability.¹

Mr Gama's complaint was one not unfamiliar in discrimination cases. In addition to specific incidents said to constitute discrimination, he argued that his workplace had an underlying culture of systemic racial intolerance that seriously impacted on his opportunities for promotion within the organisation.

Federal Magistrate Raphael found that clearly identified comments were made to Mr Gama by other employees which amounted to unlawful discrimination. Damages were awarded on the basis of these specific incidents.

However, the court did not accept Mr Gama's case concerning the broader culture of intolerance, a case that relied on the drawing of inferences.

ALLEGATION OF DISCRIMINATION

Mr Gama had worked for Qantas since 1982 as a licensed aircraft mechanical engineer, mainly in the heavy maintenance section. Mr Gama is Goan and emigrated to the UK in the 1960s where he worked for British Airways. He emigrated to Australia in 1982 to work for Qantas.

Mr Gama alleged that over a period of time he was discriminated against on the basis of his race. He provided examples of the use of racist comments by co-workers and superiors, discrimination in relation to reporting requirements

to his supervisor and unfair treatment with respect to sick leave and work attendance.

Mr Gama also alleged that Qantas failed to offer him the same conditions of work and opportunities for training and promotion that were afforded to employees of other races.

Mr Gama claimed that Qantas was vicariously liable for the breaches of the Racial Discrimination Act 1975 (Cth) (RDA) because of the awareness by the managers within his section of the actions and racial comments made by supervisors and other employees.

Mr Gama also alleged that he had been discriminated against on the basis of his disability in contravention of the Disability Discrimination Act 1992 (Cth) (DDA). Mr Gama alleged that he received less favourable treatment than other employees after he suffered a number of injuries in the workplace.

He also complained that Qantas denied or limited his access to opportunities for promotion, transfer and training on the basis of his disability. Again, Mr Gama claimed that Qantas was vicariously liable under the DDA for the actions of its employees.

DIFFICULTY IN PERSUADING COURT TO ACCEPT INFERENCES OF RACE DISCRIMINATION

Mr Gama argued that the remarks and treatment that he experienced at Qantas were indicative of an entrenched attitude towards him within the workplace because of his race. Mr Gama invited the court to draw a number of inferences from his evidence.

These included that one of the reasons for his not being promoted or sent on any training course by Qantas was the fact of his race. He also asked the court to draw an inference that some of the treatment he received from his supervisor was the result of the supervisor's racially discriminatory views about him.

The difficulties for complainants in persuading courts to draw inferences of unlawful discrimination in the absence of direct evidence is well documented and Federal Magistrate Raphael provides a useful overview of these issues in the judgment.²

While his Honour found that there "was a general culture inimical to persons"³ of certain racial backgrounds, he found that there was insufficient evidence to persuade him that there were systemic problems at Qantas or a culture in Mr Gama's workplace leading to the denial of his applications for promotion.

FINDINGS IN RELATION TO SPECIFIC INCIDENTS

Statements directed towards Mr Gama that he looked "like a Bombay taxi driver", walked up stairs "like a monkey", and more general comments that inferred that he was familiar with, and knew how to manipulate, the worker's compensation system, were found to amount to unlawful racial discrimination and, in relation to the latter two, unlawful disability discrimination.

Qantas was found to be vicariously liable for each of these incidents on the basis that they were remarks either made by, or in the presence of, a supervisor of Mr Gama and therefore condoned.

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DAMAGES

Federal Magistrate Raphael accepted medical evidence that Mr Gama experienced a severe depressive illness and that the events found to have amounted to unlawful race and disability discrimination contributed to that illness.

On the basis of the evidence that the comments alone would not account for the extreme seriousness of Mr Gama's condition, his Honour reduced the amount of general damages that he would have otherwise awarded. In doing so, he noted that Mr Gama "has only been able to persuade me of the existence of a general attitude of racial intolerance and a few unpleasant incidents". His Honour awarded Mr Gama \$40,000 in damages, representing a 20 per cent contribution to the pain and suffering he experienced as a result of the comments noted previously.

Interestingly, this appears to be one of the largest awards for general damages in the federal discrimination law jurisdiction since the jurisdiction was transferred to the Federal Court and Federal Magistrates Court.⁴

COMMENT

The case provides a warning to employers that they need to continue to be vigilant in having practices in place to eliminate discriminatory behaviour. Significant awards of damages may otherwise result due to the vicarious liability provisions that exist in all of the federal discrimination legislation.

Likewise, the case provides another warning about the difficulties for complainants who seek to persuade courts that inferences should be drawn about systemic racism and discrimination in workplaces. An appeal and cross-appeal have been lodged in the Federal Court

and a hearing date is yet to be listed.⁵

ENDNOTES

1. Gama v Qantas Airways Ltd (No.2) [2006] FMCA 1767 (8 December 2006).
2. Gama v Qantas Airways Ltd (No.2) [2006] FMCA 1767, [10]-[22].
3. Gama v Qantas Airways Ltd (No.2) [2006] FMCA 1767, [97].
4. For an overview of damages awarded under the RDA, DDA and Sex Discrimination Act 1984 (Cth), see Federal Discrimination Law 2005, Human Rights and Equal Opportunity Commission, chapter 7. Available online at www.humanrights.gov.au/legal/fed_discrimination_law_05/index.html.
5. Qantas Airways Ltd v Gama (NSD2539/2006).

SOMETHING IN THE WATER AT CRIDLANDS

Readers will remember from previous Muster Rooms that Cridlands has been making a play for the award of "family friendly" firm of the Northern Territory, with the beginnings of its very own creche enrolment over the last couple of years.

And the creche continues to grow - is there something in the water or is it the lovely harbour views at the commercial litigation end of the building getting people in a romantic mood?

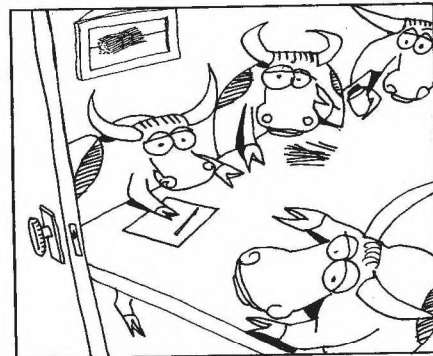
Now excitedly awaiting the births of their first offspring are Paula Edwards-Moffat, and Rhona Millar. Congratulations to both ladies and their respective partners, Ricky and Brian.

We note a couple of other former Cridlanders have also recently become first-time parents, Kathryn Martin, Anna McGill and Luke Stapleton, and we trust they are enjoying the experience.

LAWYERS A SAD BUNCH

Lawyers are among the most depressed workers in the country, according to a recent study of over 17,000 Australians.

The Muster Room



The study, conducted by Beaton Consulting in conjunction with Beyondblue: the national depression initiative, indicated that professionals had higher than average depression scores compared to the general population, and that respondents from legal professions in particular were more likely to report symptoms of moderate to severe depression. Legal professionals were also more likely to use alcohol or non-prescription drugs to reduce or manage feelings of sadness and depression.