The standard of proof in discrimination claims: the Full Court lightens the load, a little.

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We all know that prejudices are prevalent within our society. We also know that such prejudices often translate into discrimination. And yet, proving discrimination is notoriously difficult.[1]

Part of that difficulty has stemmed from the application of the High Court's decision in Briginshaw v Briginshaw[2] ('Briginshaw'), in relation to meeting the civil standard of proof. Fortunately, the recent decision of the Full Federal Court in Qantas Airways v Gama[3] ('Gama') has gone some way towards correcting this.

Briginshaw

The facts in Briginshaw involved allegations of adultery, at a time when such allegations were of considerably greater seriousness and legal consequence than they are today.[4] Whilst acknowledging that the standard of proof remains constant in all civil claims, the court observed that the quality of evidence and level of persuasion required to meet that standard may vary depending on the seriousness or inherent unlikelihood of the allegation and/or the gravity of the consequences for the respondent.[5]

With no disrespect to their Honours, the observation was not especially remarkable. As the High Court has since observed, the comments simply reflect the ordinary process of human reasoning.[6] The comments did not establish an intermediate standard of proof between the civil and criminal standard. They also did not lay down a strict test to be applied to all allegations of a particular type.[7] It is therefore perhaps curious that Briginshaw has taken on such significance in the discrimination law context compared with other areas of civil law.[8] Stemming primarily from the 1988 decision of the Victorian Supreme Court in Department of Health v Arumugam[9], courts have frequently observed that discrimination is a 'serious matter, not lightly to be inferred'[10], and, accordingly, applicants have often been effectively required to lead evidence to an apparently higher 'Briginshaw standard'.[11]

Discrimination is certainly serious; few victims of discrimination would disagree. However, there is a cold irony in acknowledging with one breath the seriousness of the harm, only to then effectively raise the evidential bar as a result.

Without wishing to diminish the significance of discrimination as a social wrong, I would suggest that there is nothing inherently 'serious' or 'unlikely' about discrimination allegations in the sense used in Briginshaw.[12] The consequences for a respondent are, in most cases, limited to a (notoriously low[13]) award of damages.

Whilst a respondent may also face some adverse publicity, this is generally no more so than in many other types of civil claims, such as negligence, misleading or deceptive conduct, unfair dismissal or product liability. The courts have also emphasised that respondents may be in breach of discrimination laws in the absence of a discriminatory intent,[14] or even with a benevolent intent,[15] which diminishes the gravity of any such finding.[16]

The recent decision of the Full Federal Court in Gama is therefore a welcome development. As discussed below, the Court clarified that discrimination claims should be approached like any other civil claim when assessing the standard of proof.

Gama

Mr Gama, an engineer from Goa, made a variety of allegations of race and disability discrimination against Qantas. These included derogatory remarks (ie. "You look like a Bombay taxi driver" or references to him walking up stairs "like a monkey") as well as denial of training and promotions because of his race and/or disability.

At first instance,[17] many of Mr Gama's allegations failed, although his allegations regarding the derogatory remarks were accepted and held to constitute discrimination on the grounds of his race and, in relation to the "monkey" comment, his disability as well.[18]

On appeal,[19] the Full Federal Court upheld the findings of race discrimination, accepting that isolated racist remarks can constitute an act of discrimination, even in the absence of any further work-related detriment.[20] The court set aside the finding of disability discrimination, however, on the basis that Raphael FM had failed to apply the applicable test under the *Disability Discrimination Act 1992 (Cth)*. Nevertheless, the court concluded that this error did not alter the assessment of damages and so did not warrant remittal.[21]

Amongst the many grounds of appeal and cross-appeal, both Qantas and Mr Gama asserted that Raphael FM had taken an incorrect approach to the drawing of inferences and the standard of proof. Whilst all of these appeal grounds failed, they provided an opportunity for the Full Court to review the application of Briginshaw in discrimination claims.

Consistent with the submissions of HREOC as intervener,[22] the Full Court accepted that discrimination

proceedings should be approached like any other type of civil claim, rather than from a starting point of presumed 'seriousness' in the Briginshaw sense. Branson J, who delivered the lead judgment on the Briginshaw issue, observed:

...references to, for example, 'the Briginshaw standard' or 'the onerous Briginshaw test' and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the *Evidence Act* provides.[23]

This is a sensible correction of the creeping trend in many courts of treating discrimination claims as somehow uniquely and inherently serious compared with other civil claims. In relation to the drawing of inferences of discrimination, Branson J also noted that a relevant matter in assessing the evidence was

"...the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict..." [24]

The onus of proving why the respondent acted as it did is carried by the applicant, yet is often wholly within the knowledge and domain of the respondent. The courts have long acknowledged this inherent difficulty for applicants in establishing a claim of discrimination.[25] The above observation by Branson J is therefore a useful reminder that, whilst respondents do not carry the onus, respondents who fail to credibly establish a non-discriminatory causal basis for their conduct do so at their own peril.[26]

Footnotes

1. See, generally, Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 Sydney Law Review 535; Katherine Lindsay, Neil Rees and Simon Rice, Australian Anti-Discrimination Law: Text, Cases and Materials (2008), 69, 93.

2. (1938) 60 CLR 336

3. [2008] FCAFC 69.

4. G v H (1994) 181 CLR 387, 399 (Deane, Dawson and Gaudron JJ).

5. The most frequently quoted passage to this effect comes from the judgment of Dixon J at 361-2. The comments are now reflected in s 140 of the Evidence Act 1995 (Cth); see CEEEIPPAS Union of Austraila v ACCC [2007] FCAFC 132, [31].

6. Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, 449-50 (Mason CJ, Brennan, Deane, Gaudron JJ).

7. Ibid. See also G v H (1994) 181 CLR 387, 399-400 (Deane, Dawson and Gaudron JJ).

8. See, generally, Loretta De Plevitz, 'The Briginshaw 'standard of proof' in anti-discrimination law: 'Pointing with a wavering finger'' ((2003) 25 Sydney Law Review 308; Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 Sydney Law Review 535.

9. [1988] VR 319.

10. Ibid 331.

11. See, eg, Ebber v Human Rights and Equal Opportunity Commission (1995) 129 ALR 455, 467-68 (Drummond J). For a detailed critique of the application of Briginshaw in discrimination claims, see De Plevitz (above n 8).

12. See the observations to this effect in Victoria v Macedonian Teachers Association of Victoria Inc and Anor (1998) 91 FCR 47, 51 (O'Connor, Sundberg and North JJ). See also Hollingdale v North Coast Area Health Service [2006] FMCA 5, [138] (Driver FM); Tyler v Kesser Torah College [2006] FMCA 1, [100] (Driver FM); Wiggins v Department of Defence – Navy [2006] FMCA 800, [52] (McInnes FM); Dutt v Central Coast Area Health Service [2002] NSWADT 133, [56]-[58].

13. Beth Gaze, 'The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 (3) University of New South Wales Law Journal 914, 919-20. See also Australian Law Reform Commission, Equality Before the Law: Women's Equality, Report No 69, pt II (1994), [3.10]; HREOC, Federal Discrimination Law (2008), 337-69.

14. See, eg, Waters v Public Transport Corporation (1993) 173 CLR 349, 359 (Mason CJ and Gaudron J); Purvis v NSW (2003) 217 CLR 92, 142-3 [160] (McHugh and Kirby JJ), 163 [236] (Gummow, Hayne and Heydon JJ). See further HREOC, Federal Discrimination Law (2008), 52-3, 104-6, 173-7.

15. See, eg, Proceeding Commissioner v Howell & Anor (1993) EOC 92-522; Churchill v Town of Cottleslow (1993) EOC 92-503; Smith v Franl & Anor (1991) EOC 92-362. See further Pelma Rajapakse, 'An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia' (1999) 90 University of Queensland Law Journal 90, 94.

16. Victoria v Macedonian Teachers Association of Victoria Inc and Anor (1998) 91 FCR 47, 51 (O'Connor, Sundberg and North JJ).

17. Gama v Qantas Airways Limited (No 2) [2006] FMCA 1767.

18. At the relevant time, Mr Gama was suffering from an injury which caused him to walk with a limp. Raphael FM accepted that the comment was based on his race and his disability: Ibid [101].

19. Qantas Airways Limited v Gama [2008] FCAFC 69.

20. Ibid [78] (French and Jacobson JJ, Branson J generally agreeing [122]).

21. Ibid [89]-[92], [121] (French and Jacobson JJ, Branson J generally agreeing [122]).

22. HREOC was granted leave to intervene in the appeal. A copy of its submission are available at http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html.

23. [2008] FCAFC 69, [139] (Branson J, French and Jacobson generally agreeing, [110]).

24. Ibid [138], citing Medtel Pty v Courtney (2003) 130 FCR 182, [76] (Branson J).

25. See, eg, Australian Iron & Steel Pty Ltd v Banovic (1989) 169 CLR 165, 176 (Deane and Gaudron JJ); Glasgow City Council v. Zafar [1998] 2 All ER 953, 958. See further Katherine Lindsay, Neil Rees and Simon Rice (above n 1), 93; S Wilborn 'Proof of Discrimination in the United Kingdom and the United States' (1986) 5 Civil Justice Quarterly 321, 321.

26. See also Glasgow City Council v Zafar [1998] 2 All ER 953, 958. Compare s 63A of the Sex Discrimination Act 1975 (UK), which effectively requires a respondent to establish a non-discriminatory explanation. See further Wong v Igen Ltd Ors [2005] 3 All ER 812. Compare also the reversal of the onus pursuant to ss 664 and 808 of the Workplace Relations Act 1996 (Cth), discussed in Bognar v Merck Sharp Dohme (Australia) Pty Ltd [2008] FMCA 571, [47]; Liquor, Hospitality Miscellaneous Union v Woonoona Bulli RSL Memorial Club Ltd [2007] FCA 1460, [21].