Discrimination is still against the law!

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Recent trends suggest a weakening focus on avoiding discrimination in some Australian workplaces. And there seems little doubt that this can largely be sourced to the High Court's well-reported judgement in the so-called *Brandy case*.

In that very important decision in 1995, the Court held that the Human Rights and Equal Opportunity Commission (HREOC), as a non-judicial body, had no power to enforce its rulings. As a result, an order by the Commission that an employer pay damages to a worker who had been racially abused at work could not be enforced. Those damages have never been paid.

Since then, commentators have emphasised that employee options for redress have been severely limited by this judgement. And some employers have been encouraged to believe that, even if discrimination could de demonstrated, the chances of their being successfully prosecuted for it were remote. In short, the Human Rights and Equal Opportunity Commission specifically, and the *Racial Discrimination Act* more generally, were seen to have become something of a toothless tiger.

Any sense of security which might have been gained from these developments is likely to be short-lived, however. The federal Attorney-General has now introduced into Parliament a *Human Rights Legislation Amendment Bill*, with the principal objective of addressing difficulties created by the Brandy case. If passed, the Bill, among other things, will transfer the power to hear and determine cases which cannot be conciliated to the Federal Court. The decisions which result will then, of course, be rigidly enforced.

The implication for employers is that proper employment policies which ensure racial discrimination does not occur will be absolutely essential. And recent case law only confirms that this is so for all other forms of discrimination too.

For example, where sexual harrassment in the workplace is concerned anti-discrimination tribunals are taking an increasingly hard line in applying the *Sex Discrimination Act* against employers who do not act to eliminate the practice. The Queensland tribunal recently awarded a record payout to a woman who had been subjected to vulgar taunts by male employees and who had received less favourable treatment in the workplace than her male colleagues. In considering the case, the tribunal found that the employer (a well-known major company) had not taken necessary action to direct employees not to engage in disciminatory behaviour. The judgement makes it quite clear that it is insufficient for employers merely to write policies for non-discrimination. They also have a legal obligation to communicate their policy to staff, to train employees where necessary, to monitor application of policy and to take action against employees who do not comply.

In another case, a company was ordered to pay $15 000 damages to a secretary for sexual harrassment by her manager. The organisation was found to be vicariously liable for the manager's actions, primarily because it had not put in place effective policies and grievance procedures to deal with discriminatory conduct.

Similarly, the *Disability Discrimination Act* is being forcefully imposed. The Australian Defence Force was recently found to have acted unlawfully in discharging an HIV positive employee under an occupational health and safety policy which prevented employment of those who are HIV positive. The Federal Court found that because the employee was able to carry out his normal duties and was symptom-free, his discharge was in breach of the Act.

A second disability case has shown that a case is need when using pre-employment medical tests as part of selection processes. A major mining company was ordered to pay $14 000 in damages to an applicant who was denied a job after an adverse pre-employment medical finding. In the judgement the Northern Territory's Anti-Discrimination Commissioner emphasised that, while pre-employment medical examinations could play a valuable part in selection processes, it was unlawful to use them to deny employment other than by specific reference to defined tasks. If an employee was found to have a history of back problems, for example, this could validly render the applicant unsuitable for a job of which lifting was an essential component. It could not, however, be used to establish unsuitability for all employment. This decision has been followed by release in Victoria of guidelines to assist employers to use pre-employment medicals that comply with that state's *Equal Opportunity Act*.

As far as racial issues are concerned, it seems clear that the current so-called 'race debate' is alarming the tribunals. One obvious result is release by the Human Rights and Equal Opportunity Commission of a *Draft Employment Code of Practice* for the elimination of racial discrimination. The Code sets out practical steps for adopting policies which prevent racial harassment and vilification. It points out that every organisation, regardless of its size, is legally bound to take all reasonable steps to prevent discrimination. And the onus is on employers to demonstrate that they have done so, if they wish to avoid liability. The Code also deals with the responsibilities of trade unions, individual employees and employment agencies, and defines clearly what constitutes unlawful conduct. After consultation, the Code is expected to bind all employers in Australia, including small business and community organisations.

For employers in the library and information sector, and for all ALIA members, all of this demonstrates clearly that, notwithstanding the current attacks on political correctness, the proscription on discrimination at work is based, not merely in fashion, but firmly in law. They will ignore it at their peril. ■

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