Human Rights and Equal Opportunity Commission - www.humanrights.gov.au/legal

Human Rights Law Bulletin

formerly the Legal Bulletin

Volume 15 March - May 2006

HUMAN RIGHTS LAW

March – May 2006

Inside this issue

1. Introduction and forthcoming seminar details

present the seminar

EQUAL PAY FOR EQUAL WORK?

THE HIGH COURT'S DECISION IN STATE OF NSW v AMERY

Chair

Graeme Innes, Human Rights Commissioner and Commissioner responsible for Disability Discrimination

Speakers

Dr Christopher Birch SC Barrister & Counsel for the respondents in *State of NSW v Amery*

and

Simeon Beckett Barrister, President of Australian Lawyers for Human Rights

On 13 April 2006 The High Court brought down its decision in *State of NSW v Amery*. A number of female casual teachers said that they were being discriminated against on the ground of their sex in the amount they were paid. The Court rejected their argument that they were discriminated against by being paid less for work of the same value when compared to permanent teachers who comprise a higher proportion of men.

Dr Birch will examine the history of the case, explaining how it sought to address the plight of female casual teachers, and the evolution of the issues as the case progressed. He will look at some implications of the case for the law of indirect discrimination and lessons that may be learned about the conduct of major test cases in anti-discrimination law. Simeon Beckett will provide comment.

Admission is free and the seminar will take place on **14th June 2006 at 12:30pm – 2:00pm**. The venue is:

Bar Association Common Room
Basement Level 1, Selborne Chambers
174 Phillip Street, Sydney 2000

Reservations are essential. To attend please RSVP Ms Gina Sanna at legal@humanrights.gov.au

2. Selected Developments in Discrimination Law

- ***State of New South Wales v Amery [2006] HCA 14 (13 April 2006)***

In the *State of NSW v Amery* [2006] HCA 14, the respondents alleged that the Education Department had indirectly discriminated against them on the basis of their sex in breach of the *Anti-Discrimination Act 1977* (NSW) ('ADA'). They alleged that as 'temporary teachers' they were denied access to the higher salary levels available to permanent teachers engaged in the same work.

Upholding the appeal, the majority of the High Court dismissed the respondents claim. Kirby J dissented.

Structure of the NSW teaching service

The *Teaching Services Act 1980* (NSW) (the '*Teaching Act*') sets out the scheme for the employment of teachers by the Department. It divides the teaching service into permanent and temporary employees, and attaches different conditions to each. Significantly, permanent teachers must be able to be re-deployed as and when required by the Department.

The dichotomy between permanent and temporary employees created by the *Teaching Act* is the basis of the differential pay scales adopted in the relevant industrial award (the 'Award'). The Award provides 13 pay scales for permanent teachers and 5 for temporary teachers. The highest pay scale for temporary teachers is equivalent to level 8 of the permanent teachers scale.

What was the 'requirement or condition' imposed by the Department for the purposes of s 24(1)(b) of the ADA?

This was the first issue before the High Court. The respondents alleged that the requirement or condition was to 'have permanent status', permanent status being a condition of access to the higher salary levels.

Gleeson CJ held that, in identifying the requirement or condition, the question that had to be answered was what did the Department do to impose the requirement of permanency? His Honour held that it was its practice of not paying above award wages to temporary teachers engaged in the same work as their permanent colleagues that 'required' the respondents to have permanency to access the higher salary levels.

Gummow, Hayne and Crennan JJ (Callinan J agreeing) rejected the respondents' characterisation of the requirement or condition on the basis that they had not properly identified the relevant 'employment'. Their Honours held that 'employment' in s 25(2)(a) of the ADA referred to the 'actual employment' engaged in by a complainant, not employment in the general. Having regard to the 'significantly different' conditions which attach to permanent and temporary employees under the *Teaching Act*, they held that the respondents were not employed as 'teachers' but 'temporary teachers'. This rendered the alleged requirement or condition incongruous.

Kirby J, rejected the approach adopted by Gummow, Hayne and Crennan JJ as being 'narrow and antagonistic' and inconsistent with the beneficial and purposive approach required to be taken to remedial legislation such as the ADA. His Honour held that the Department required the respondents to have permanent status to access the higher salary levels.

Reasonableness

Gleeson CJ (Callinan and Heydon JJ agreeing) was the only member of majority to consider the issue of reasonableness. His Honour stated that in the present context, the question of reasonableness was not whether the *teaching* work of a temporary teacher has the same value of a permanent teacher, but 'whether, having regard to their respective conditions of employment, it is reasonable to pay one less than the other'. His Honour held that it was reasonable for the Department to pay permanent teachers more than temporary teachers given the 'significantly different' conditions of permanent and temporary teachers.

Kirby J held that the requirement or condition imposed by the Department was not reasonable, there being nothing in the *Teaching Act* justifying the 20% difference in pay.

You can read this decision at: http://www.austlii.edu.au/au/cases/cth/high_ct/2006/14.html

For further discussion of this case, see 'State of NSW v Amery: Pay Equity Implications' by Joanna Hemingway, Lawyer at the Human Rights and Equal Opportunity Commission, which will appear in the June edition of the *Law Society Journal.*

- ***HBF Health Funds Inc v Minister for Health and Ageing [2006] FCAFC 34 (21 March 2006)***

The Full Federal Court of Australia upheld the Administrative Appeals Tribunal's ruling that the appellant's proposed loyalty bonus scheme contravened the prohibition on improper discrimination contained in s.66(1) of the *National Health Act 1953 (Cth)*.

HBF had attempted to introduce a loyalty scheme which took into account the level of claims made for ancillary benefits by the contributor over a period of three years and also required the contributor to turn 65 before being able to access the financial benefits of the scheme. However, s.73 AAH of the *National Health Act* prohibits any activity that constitutes improper discrimination against a potential contributor. Section 66(1) provides that improper discrimination is a discrimination related to… *(ba) the age of a person; or… (d) the amount, or extent, of the benefits to which a person becomes, or has become, entitled during a period.* Schedule 1 of the Act repeats the prohibition of consideration

of those matters in relation to participation in a loyalty bonus scheme.

The Court held that the rules of the loyalty scheme constituted 'improper discrimination' under s.66(1)(ba) and (d) of the Act. Once the scheme was established as being discriminatory under the Act, it was not open to HBF to argue that the discrimination was permissible because it advanced certain other policy objectives of the Act.

You can read this decision at http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/34.html

3. Selected Developments in International Law

3.1 United Nations Human Rights Committee

- ***Brough v Australia Communication No. 1184/2003 UN Doc CCPR/C/86/D/1184/2003***

In 1999 the author of the communication, Corey Brough, an Aboriginal youth with a mild mental disability, was transferred from a juvenile detention centre to the Parklea Adult Correctional Centre. At Parklea, the author was segregated from the other inmates and held in a 'safe cell' in a segregation area. The author experienced difficulty coping with the long periods of being locked in the safe cell and began to self harm. On 7 April 1999 the author was allegedly stripped to his underwear and confined to a dry cell for 72 hours, with lights on day and night. On 15 April 1999 the author was confined to his cell for 48 hours. The author also alleged he was administered 'Largacitil', an anti-psychotic medication without his consent.

The author claimed that the conditions of his segregation and confinement in Parklea detention centre were in violation of Art 7 (right not to be subject to torture, cruel, inhuman or degrading treatment) and Art 10 (right of prisoners to be treated with humanity and respect for the inherent dignity of the person) of the International Covenant of Civil and Political Rights (ICCPR). The author also claimed his transfer to an adult institution violated Art 10(3) which states that juvenile offenders shall be segregated from adults and provided with treatment that is appropriate to their age and legal status.

The UN Human Rights Committee (HRC) stated that the question of whether inhuman treatment attains the minimum level of severity to come within the scope of Art 10 of the ICCPR must be assessed by examining the circumstances of the case, including the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim. The HRC found that 'the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his status as an Aboriginal'.

The HRC held that the author's treatment violated Art 10(1), 10(3) and Art 24(1) which provides that every child has the right to such measures of protection required by his status as a minor. The HRC rejected the author's claims that the administration of anti-psychotic medication to the author without his consent was a breach of Art 7, noting that the medication was prescribed following medical advice with the intention to control the author's self-destructive behaviour.

You can read this decision at: http://www.bayefsky.com/./doc/australia_t5_iccpr_1184_2003.doc

3.2 Other jurisdictions

- ***R (on the application of Begum (by her litigation friend Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15***

The respondent, who was a Muslim, sought to attend school wearing a form of dress known as the jilbab rather than the shalwar kameeze as allowed under the school's uniform policy on the basis of her religious beliefs. The school refused to allow her to wear the jilbab on the basis

that the uniform policy, which had been developed in consultation with staff, students and religious leaders, was more than reasonable in taking into account cultural and religious concerns.

The issues before the House of Lords were: first, whether the respondent's freedom to manifest her religious belief by her dress was subject to a limitation within the meaning of Art 9(2) and, if so, whether the limitation was justifiable; and, second, whether the respondent had been denied access to education in breach of Art 2.

The House of Lords held (Lord Nicholls of Birkenhead and Baroness Hale of Richmond dissenting) there had been no interference with the respondent's right to manifest her religion in practice or observance. The Lords observed that there were three schools in the area where the wearing of the jilbab was permitted and, while one of the schools was full, the Lords did not accept the respondent's assertion the other two schools were too distant, stating [at 25 per Lord Bingham] that there is 'no evidence to show that there was any real difficulty in attending one or other of those schools'.

The House of Lords unanimously held that even if it was accepted that the appellants' action constituted an interference with the respondent's right to manifest her religion, the limitation was justifiable. The school's dress code had been developed after extensive consultation with the staff, parents, students and imans and the school was entitled to consider that the uniform code protected the rights and freedoms of others.

In relation to Art 2, the House of Lords held that the respondent's right not to be denied education was not infringed. The appellants were entitled to require the respondent to comply with the uniform code and there was nothing to suggest that the respondent could not have found an alternative school which permitted her to wear the jilbab.

In deciding the case, the House of Lords affirmed that what constitutes interference with the manifestation of religious belief depends on the particular facts and circumstances of the case, including the extent to which an individual can reasonably expect to be at liberty to manifest his beliefs in practice: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 at [38].

You can read this decision at: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-1.htm

- ***Re MB [2006] EWHC 1000 (12 April 2006)***

The issue in this case was whether the judicial supervision of a non-derogable control orders under the *Terrorism Act 2005* (UK) (the Act) is compatible with the right to a fair hearing under Art 6(1) of the European Convention on Human Rights (ECHR). A non-derogable control order is a control order that does not require the Secretary of State to make a derogation from Art 5(1) of the ECHR (the right to liberty).

Under the Act, once a non-derogable order has been made, the Court is required to hold a hearing to determine whether the decision of the Secretary of State to impose a control order under the Act was 'flawed', applying the principles of judicial review.

The High Court held that the limited supervisory role given to the judiciary fell far short of what was required by Art 6(1) given the lack of availability of any merits review at any other stage of the decision making process and having regard to the nature and consequences of the Secretary's decision. The Court consequently declared those provisions in the *Terrorism Act 2005* relating to the Court's supervision of non-derogatory control orders as incompatible with the right to a fair hearing recognised by Art 6(1) of the ECHR pursuant to s 4 of the *Human Rights Act 1998* (UK).

You can read this decision at: http://www.bailii.org/ew/cases/EWHC/Admin/2006/1000.html

- ***Balvir Singh Multani and Gurbaj Singh Multani v. Commission scolaire Marguerite-Bourgeoys and Attorney General of Quebec 2006 SCC 6***

The plaintiff was an orthodox Sikh who believed that his religion required him to wear a kirpan (a religious object similar to a metallic dagger) at all times. After the plaintiff accidentally dropped his kirpan at school, the school board's council of commissioners refused to allow him to take it to school despite his willingness to abide by increased security measures. The plaintiff claimed that the decision of the school board infringed his freedom under s.2(*a*) of the *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*').

On appeal, the Supreme Court of Canada found that an absolute prohibition against wearing a kirpan infringed the freedom of religion of the plaintiff under section 2(*a*) of the *Canadian Charter*. Moreover, the infringement could not be justified under section 1 of the *Canadian Charter*, which guarantees the rights only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Although the council's decision was motivated by a pressing and substantial objective of ensuring reasonable level of safety at the school, the defendant did not show the unequivocal existence of safety concerns nor that such an absolute prohibition minimally impaired the student's rights. By disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school community, the council made an unreasonable decision.

You can read this decision at: http://scc.lexum.umontreal.ca/en/2006/2006scc6/2006scc6.html

4. Upcoming Human Rights Events

- **Australians and the Death Penalty: National and International Dimensions**

The Institute of Criminology and the Sydney Centre for International and Global Law, University of Sydney are holding a seminar on *Australians and the Death Penalty: National and International Dimensions.*

The Seminar will be held from 3:00-7:30pm on **7 June 2006** at the NSW Parliament House Theatrette, Macquarie St, Sydney. The Cost is $50, $15 concession. To find out more about the seminar or to register online please visit http://www.criminology.law.usyd.edu.au/seminars.htm .

- ***Australian Bill of Rights: The ACT and Beyond***

The ACT Human Rights Act Research Project, the Regulatory Institutions Network at the ANU and Gilbert + Tobin Centre of Public Law will hold a one day event in Canberra assessing recent developments in Australian Bills of Rights. This conference will survey the impact of A.C.T Human Rights Act, examine the proposed Charter of Human Rights and Responsibilities in Victoria and look at developments in other states and at the national level as well as exploring the comparative perspective from New Zealand.

The conference will be held on Wednesday, **21 June 2006** at Law Theatre, College of Law, Australian National University, Canberra. The cost is $150 (including lunch), $60 for concessions.

For registration and further information, please contact Gabrielle McKinnon at ph: (02) 6125 7103 or Email: Gabrielle.McKinnon@anu.edu.au

- **Legislatures and the Protection of Human Rights**

The Melbourne University Centre for Comparative Constitutional Studies is holding a conference on *Legislatures and Human Rights* from the **20 - 22 July in Melbourne** at the University of Melbourne Faculty of Law.

Conference Registrations costs $250 & $150 concession. Tickets to the conference dinner cost an additional $100. Further details including the conference program and registration form are available online at http://cccs.law.unimelb.edu.au/

- **HREOC Events and Publication Calendar**

For additional upcoming events and publications related to human rights issues visit the HREOC Events and Publication Calendar at http://www.humanrights.gov.au/events/index.html

If you have a human rights event that you wish to publicise in the *Human Rights Law Bulletin* please email francessimmons@humanrights.gov.au