HUMAN RIGHTS LAW BULLETIN

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1. Selected General Australian Law

Milan Tomasevic v Danny Travaglini & County Court of Victoria **[2007] VSC 337 (13 September 2007)**

The applicant sought judicial review of a decision to deny him leave to appeal on the grounds that the application was out of time.

Relevantly, Bell J considered whether the Court failed to perform its duty to give due assistance to Mr Tomasevic as an unrepresented litigant. Bell J held that although *Charter of Human Rights and Responsibilities Act 2006* (Vic) was not applicable to the case, the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) should be taken into account when determining the duty of the judge to ensure that the fundamental human rights of equality before the law and access to justice are promoted and respected, particularly in the case of unrepresented litigants.

Bell J held that although the judge cannot become an advocate for the party, s/he does have an overriding duty to ensure that the trial is fair. In particular instances this may entail providing self-represented litigants with due assistance. Bell J held that the proper scope of the assistance depends on the particular litigant and the nature of the case, with the touchstones being fairness and balance. Furthermore, that the assistance must be proportionate in the circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.

After examining the transcript, Bell J found that the County Court judge had erred in failing to: acknowledge that the applicant was appearing without legal representation; explain the procedure that should be followed; inform Mr Tomasevic of the legal requirements he

must satisfy in order to succeed; offer an adjournment for the applicant to seek legal representation; or ask for an elaboration of any of Mr Tomasevic's submissions.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/vic/VSC/2007/337.html

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2. Developments in Australian Discrimination Law

Comprehensive coverage of developments in Federal Discrimination Law can be found in the periodical supplements to HREOC's publication *Federal Discrimination Law* 2005. See: www.humanrights.gov.au/legal/FDL/fed_discrimination_law_05/.

Carlie Streeter v Telstra Corporation Ltd **[2007] AIRC 679**

Ms Streeter brought a claim of unfair dismissal against Telstra under the *Workplace Relations Act 1996 (Cth)*.

A group of Telstra employees had booked hotel accommodation following a staff party. The applicant was summarily dismissed for a range of behaviour said to constitute sexual harassment: being naked in the presence of a fellow employee in a hotel bathroom, being present in the bathroom while a fellow employee urinated and engaging in sexual intercourse in the same room as sleeping colleagues. She was also alleged to have dishonestly answered questions during investigation of the matter.

The applicant submitted that the alleged sexual misconduct did not occur at a work related function and, even if it did, did not constitute sexual harassment with the meaning of s 28A of the *Sex Discrimination Act (1984) (Cth)*.

Senior Deputy President Hamberger held that on the facts the applicant's conduct could not properly be characterised as sexual harassment or an indecent act within the meaning of s 61N of the *Crimes Act 1900* (NSW). The applicant's conduct was not so serious that it constituted a valid reason for termination of her employment. Reinstatement and remuneration were ordered.

You can read the full decision at:
http://www.airc.gov.au/decisionssigned/html/2007airc679.htm

Silberberg v The Builders Collective of Australia Inc **[2007] FCA 1512**

The applicant alleged a breach of the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth) (RDA) in respect of two postings on an internet discussion forum. The claim was brought against the individual who posted the relevant postings, as well as against the incorporated association which hosted the forum as part of its website.

Justice Gyles found in favour of the applicant in respect of the claim against the individual. In respect of the host of the forum, his Honour held that a failure of a website host to remove known racially offensive material could constitute an 'act' for the purposes of s 18(1)(a) of the RDA, namely an act otherwise than in private that is reasonably likely to offend, insult, humiliate or intimidate another person or group. However, his Honour held that it had not been established that that act was done because of the applicant's race or

ethnic origin as required by s 18(1)(b). The claim against the host of the forum therefore failed.

You can read the full decision at:

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2007/1512.html?query=^discrimination

***Pulteney Grammar School v Equal Opportunity Tribunal & Ors* [2007] SASC 308**

The applicant (a school) sought an exemption under the *Equal Opportunity Act 1984* (SA) to allow the school to give preference to female students in enrolment to improve the gender balance of the school.

At first instance, the Equal Opportunity Tribunal refused the exemption on the basis that the object of the Act was to prevent discrimination, not achieve overall gender balance in schools. Further, achieving a strict gender balance in schools was unrealistic in practice. On appeal, the Full Court of the South Australian Supreme Court held that the Tribunal had erred in defining the object of the Act too narrowly. The Court held that the Act was not confined to eliminating discrimination, but also aimed to promote equality of opportunity more broadly. However, the Court upheld the refusal of the exemption on the basis that there was not a sufficiently large gender imbalance at the school and the number of females enrolled at the school was on a steady increase.

You can read the full decision at:
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/2007/308.html?query=^discrimination

Toll Pty Limited trading as Toll Express v Abdulrahman [2007] NSWADTAP 70

Mr Abdulrahman was subjected to derogatory remarks at work based on his ethno-religious origin, being his Lebanese background and Muslim religion. The comments included being referred to as a 'bomb chucker' and 'Osama Bin Laden'. The Administrative Appeals Tribunal ('ADT') found that this constituted race discrimination contrary to the Anti-Discrimination Act 1977 (NSW) and awarded $25,000 in damages. Toll appealed to the Appeal Panel of the ADT.

Toll argued, amongst other things, that following the decision of the High Court in Purvis v State of New South Wales (2003) 217 CLR 92, the ADT was required to compare Mr Abdulrahman's treatment with that of others with the same objective features. This required a consideration of whether Mr Abdulrahman was treated differently to 'other employees who were not of the same racial background but had racial backgrounds to which violence (including terrorism) was attributed.'

The Appeal Panel rejected this submission, finding (at [26]) that:

> Purvis does not require the Tribunal to include imputed or presumed stereotypical or prejudiced assumptions when identifying the objective circumstances. In particular, Purvis does not require the comparison in this case to be made with a person of a different race who is assumed to have violent or terrorist tendencies. If that were the case then prejudice and stereotyping on the ground of race would be lawful.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2007/70.html

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3. Recent HREOC Reports

Report of an Inquiry into Dr Julie Copeman's complaint that Derbarl Yerrigan Health Service terminated her employment on the basis of her trade union activity (HREOC Report no. 37, 3007)

Dr Copeman made a complaint to HREOC that Derbarl Yerrigan Health Services (DYHS) discriminated against her by terminating her employment on the basis of her trade union activities.

Under s 31(b) of the HREOC Act, HREOC has the power to inquire into acts or practice that may constitute discrimination on the basis of trade union activity.

This function helps give effect to Australia's obligations under the *International Labour Organisation Convention (No.111) concerning Discrimination in respect of Employment and Occupation* (ILO 111).

HREOC found that DYHS had discriminated against Dr Copeman by terminating her employment on the basis of her trade union activities.

HREOC recommended that DYHS pay Dr Copeman a total of $76,185 in compensation ($ 69, 185 for loss of salary and superannuation and $ 7000 for emotional hurt).

You can read HREOC Report no. 37 online at:
http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_37.pdf

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4. Recent HREOC Submissions

Submission by HREOC to the Consultation Committee for the proposed Western Australia Human Rights Act

HREOC made a submission to the Consultation Committee for the proposed Western Australia Human Rights Act in response to its discussion paper on 'A Human Rights Act for WA' and a *Human Rights Bill 2007* (WA).

HREOC argued that a statutory West Australian Human Rights Act (WA HRA) could significantly improve human rights protection in WA by:

- Creating a dialogue between the three arms of government – the Courts, the Executive and the Legislature – about human rights protection in WA;
- Fostering a culture of human rights in the law and policy making process and in the broader WA community;
- Creating a greater level of public transparency and debate about the role of Parliament in protecting human rights;
- Preserving parliamentary sovereignty by making sure that Parliament has the 'last say' about whether legislation complies with a WA Human Rights Act.

You can read a full copy of HREOC's submission online at:

http://www.humanrights.gov.au/legal/submissions/2007/wa_hr_act.html

You can find out more about the proposed WA Human Rights Act at: http://www.humanrights.wa.gov.au/

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5. International Developments

Dudko v Australia: Human Rights Committee Communication No. 1347/2005

The author of the communication, Lucy Dudko, complained to the Human Rights Committee that Australia had violated, *inter alia,* her right to equality of treatment before the Courts, in breach of Article 14(1) of the *International Covenant on Civil and Political Rights.* The complaint was based on her inability to participate in person at her application for leave to appeal to the High Court, following her imprisonment.

The Committee found that although the defendant had the opportunity to submit written papers to the High Court, her non-appearance at the hearing constituted a breach of Article 14. The Committee noted that there was no reason why it would be permissible for the State to take part in the hearing in the absence of an unrepresented defendant, or why an unrepresented defendant in detention should be treated more unfavourably than unrepresented defendants who are not in detention. Currently most states in Australia guarantee the right to attend an appellate hearing.

You can read the full decision at:
http://www.ohchr.org/tbru/ccpr/Dudko_v_Australia.pdf

Abu Rideh v Secretary of State for the Home Department
[2007] EWHC 2237

Mr Abu Rideh appealed against a decision of the UK Secretary of State to modify elements of his control order pursuant to her powers under s 7(2)(d) of the *Prevention of Terrorism Act 2005* (UK). The first ground of appeal was that the modified control order amounted to a breach of Mr Abu Rideh's right to liberty under Art 5 of the *European Convention on Human Rights* (ECHR) on the basis of its cumulative effect in his changed circumstances. Most importantly, these circumstances included that Mr Abu Rideh was now living alone and that according to his clinical psychologist his general mental health was declining and he was at risk of committing suicide. The second ground argued by the appellant was that these changed circumstances also entailed that the modified control order breached Mr Abu Rideh's rights under Arts 3 and 8 of ECHR – the prohibition of torture and the right to respect for private life respectively.

The issue of control orders has been a controversial one in the UK and the House of Lords is yet to deliver its judgment in a string of appeals relating to this issue. The law may therefore be said to be in a state of flux and Justice Beatson therefore applied the law as it presently stands, taken from the decision of the Court of Appeal *Secretary of State for the Home Department v* E, which has itself been appealed to the House of Lords. Justice Beatson determined that the central issue in the present case related to the degree of physical restraint on physical liberty that the modified control order imposed. After consideration of the evidence, His Honour came to the conclusion that the line had not been crossed, in that the changes to the control order did not constitute a deprivation of his liberty.

On this basis, Justice Beatson dismissed the appeal as there were no grounds for quashing the decision of the Secretary of State.

You can read the full decision at:
http://www.bailii.org/ew/cases/EWHC/Admin/2007/2237.html

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6. Upcoming Human Rights Events

Launch of the Australian Centre for Human Rights Education
When: 13 December, 6 pm
Where: Casey Plaza, RMIT University
Professor Margaret Gardner, Vice Chancellor, RMIT University, will launch the Centre during Human Rights Week. The Centre for Human Rights Education works collaboratively to develop strategies and tools for the promotion, adoption and enactment of human rights.

At the launch discussion will take place on how to build a human rights environment which advances a full and decent life for all.
Speakers: Don Watson, author and writer of the Paul Keating Redfern speech; Bryan Dawe, satirist and Reconciliation advocate *"We failed to ask: how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded us all?"* (Paul Keating, 1992 Redfern Speech)
