



Australian
Human Rights
Commission

Swamy v Percival

[2013] AusHRC 66

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Swamy v Percival

Report into unlawful discrimination
in employment based on religion

[2013] AusHRC 66

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Contents

1	Introduction to this inquiry	2
2	Circumstances giving rise to the complaint	2
	2.1 Complaint by Mr Swamy	2
	2.2 Submissions by respondents	3
	2.3 Fair Work Australia proceedings	4
3	Relevant legal framework	4
4	Consideration and findings	5
5	Recommendations	6
6	Responses to my conclusions and recommendations	7



**Australian
Human Rights
Commission**

21 October 2013

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Ganesh Swamy against Mr Brad Percival and Australian Refined Alloys Pty Ltd (ARA).

I have found that Mr Percival's harassment of Mr Swamy constituted discrimination in employment on the basis of religion.

The Commission sought a response from Mr Percival and ARA to this report on several occasions. No response was received on behalf of either Mr Percival or ARA.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish underneath.

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint by Mr Ganesh Swamy against Mr Brad Percival and Australian Refined Alloys Pty Ltd (ARA) alleging discrimination in employment on the basis of religion. At the time of the complaint, Mr Percival was Mr Swamy's supervisor at ARA.
2. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. As a result of the inquiry, the Commission finds that the conduct engaged in by Mr Percival amounted to discrimination in employment on the basis of religion. During the course of the inquiry, the Commission previously found that ARA had not engaged in discrimination in employment on the basis of religion. This report deals only with the complaint against Mr Percival.
4. The matters giving rise to this complaint have been canvassed in proceedings brought by Mr Swamy against ARA in Fair Work Australia alleging unfair dismissal under s 394 of the *Fair Work Act 2009* (Cth). The Commission has been provided with a copy of the decision of Senior Deputy President Hamberger and a transcript of those proceedings.
5. Mr Swamy and ARA participated in a conciliation conference facilitated by the Commission but the matter was ultimately unable to be settled by conciliation.

2 Circumstances giving rise to the complaint

2.1 Complaint by Mr Swamy

6. Mr Swamy is a Hindu. He was employed by ARA at its lead smelter in Alexandria in Sydney from 1 June 2009 until 1 June 2011.
7. On 17 April 2012, Mr Swamy made a complaint in writing to the Commission alleging that he had been subjected to discrimination in employment because of his religious beliefs.
8. Mr Swamy said that between January and May 2011, he was harassed by his then team leader Mr Percival because of his religious beliefs. Several instances were described by Mr Swamy. In his written complaint he said:

I was harassed by my former team leader Brad Percival because of my religious beliefs. One day he called me inside the control room and said my hair is too big and I should cut it. I told him I did not cut my hair for religious reasons. Then he said: 'Shave it off'. Again, I told him I can't do this for my religious reasons. He said: 'What the fuck [is] this religion you have?'. He said: 'I have no religion'. Mr Percival questioned the medallion I wear with the image of god. He also questioned the screen saver on my mobile phone. I told him these were the images of my god. He replied: 'You have religion everywhere'.

On my prayer day I am strict to vegetarian. In front of my former work mates Mr Percival asked me what I was eating. I told him: 'Cheese sandwich'. He yelled: 'See what shit Ganesh is eating!'. I was humiliated by this. I continually asked Mr Percival not to be critical of my religious beliefs but this attitude did not change.

9. Mr Swamy also alleged serious bullying behaviour by Mr Percival including grabbing Mr Swamy's right hand and holding it down near a roller, risking a crush injury.
10. Mr Swamy said that he raised his concerns with his supervisor Mr David Grant about the behaviour of Mr Percival. Mr Swamy said that Mr Grant spoke with Mr Percival about Mr Percival's conduct but that this 'only increased the intensity of his bullying and harassment'. Mr Swamy said that it was only after he told Mr Grant that he intended to make a complaint to the Australian Human Rights Commission that his complaint was escalated to the plant manager Mr Dennis Boyle.
11. Mr Swamy met with Mr Boyle and Mr Grant. He said that he was given an assurance by Mr Boyle that Mr Boyle would meet individually with Mr Percival about the allegations made by Mr Swamy. Mr Boyle also committed to holding a group meeting to discuss the issues. Mr Swamy complains that no group meeting was ever arranged.

2.2 Submissions by respondents

12. ARA provided a copy of the complaint to Mr Percival who at the time was still employed by ARA. ARA provided submissions on its own behalf and on behalf of Mr Percival. Mr Percival did not separately participate in the conciliation process.
13. ARA says that it took the complaints made by Mr Swamy about discrimination on the basis of religion very seriously and took steps to investigate the complaints immediately. It denies that Mr Swamy suggested that he would make a complaint to the Commission before the matter was escalated to Mr Boyle.
14. In evidence given to Fair Work Australia, Mr Grant denied that Mr Swamy reported physical bullying to him including the incident described in paragraph 9 above. Similarly, Mr Boyle gave evidence that if such an allegation had been brought to his attention the company would have undertaken an immediate investigation and, if it was established, it would likely have resulted in the dismissal of Mr Percival.
15. ARA accepts that Mr Percival engaged in non-physical bullying and harassment based on Mr Swamy's religion.
16. ARA says that once Mr Grant became aware of the allegations, he reported them to Mr Boyle who took immediate action to investigate them. This included conducting interviews with all of Mr Swamy's team members in order to confirm what had taken place.
17. As a result of this investigation, Mr Percival was issued with a final warning and other staff members were reminded of their obligations in relation to discriminatory conduct. Mr Swamy was advised of the result of the investigation.

18. In oral evidence to Fair Work Australia, Mr Grant described the course of conduct as follows:

I was going to say there was issues with Brad and Ganesh. From what I knew, it was more of – maybe intimidation through verbal – like, screaming. I did speak to Brad about that. As far as I know, his behaviour adjusted accordingly, but I do remember Ganesh came to see me about Brad – about his hair and his religion. I think that was at the same time. Actually can I back-pedal a bit? I think I actually overheard that being discussed in the crib room, so I pursued it a bit further. Ganesh told me exactly what had happened with Brad. He asked me to just talk to Brad about it and I said, ‘No’. I said, ‘This is quite serious,’ so then I reported it to my boss.

We got Brad in; went through the issue with Brad. Brad was honest with what was said. He accepted it was inappropriate to say it. He received a final written warning over that. Also we got the rest of the crew in, as well, just to talk to them about, you know, what sort of behaviour is acceptable at work and what’s not.

19. ARA says that Mr Grant was approached by Mr Swamy after Mr Percival had been counselled. Mr Swamy said that he was happy with the outcome of the complaint and that Mr Percival’s behaviour towards him had improved.

2.3 Fair Work Australia proceedings

20. On 1 June 2011, Mr Swamy’s employment with ARA was terminated. ARA claimed that his employment was terminated as a result of ‘ongoing issues with absenteeism’ and followed Mr Swamy being issued with a final written warning about this behaviour on 7 January 2011.
21. On 10 June 2011, Mr Swamy made a complaint to Fair Work Australia alleging that his dismissal was unfair. Mr Swamy alleged that one of the reasons for his employment being terminated was that he had complained about the conduct of Mr Percival and was seen as a ‘troublemaker’.
22. The application was dismissed by Senior Deputy President Hamberger. The Senior Deputy President was satisfied that Mr Percival had no involvement in Mr Swamy’s dismissal and that Mr Swamy’s complaint about Mr Percival played no role in his dismissal.

3 Relevant legal framework

23. Part II, Division 4 of the AHRC Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia’s international obligations under ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958 (ILO 111).
24. ILO 111 prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin as well as other grounds specified by ratifying States.
25. Section 3(1) of the AHRC Act defines ‘discrimination’ for the purposes of s 31(b) as:
- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

- (b) any other distinction, exclusion or preference that:
- (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

- (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.
26. The Committee of Experts on the Application of the ILO Conventions and Recommendations has confirmed that 'any discrimination – in law or in practice, direct or indirect – falls within the scope of' ILO 111.¹ Direct discrimination includes sexual harassment and other forms of harassment.²
27. The Committee considers that measures to prevent and prohibit harassment at work should address both 'quid pro quo' and 'hostile environment' harassment.³ It provides the following definitions of each (in the context of sexual harassment):⁴
- (1) (*quid pro quo*): any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job;
 - (2) (*hostile work environment*): conduct that creates an intimidating, hostile or humiliating working environment for the recipient.

4 Consideration and findings

28. It appears that there is no dispute that Mr Percival engaged in conduct that involved harassment of Mr Swamy on the basis of his religion. In particular, Mr Percival criticised Mr Swamy about the length of his hair, religious images that he carried, and his vegetarianism.
29. At the time that Mr Percival engaged in this conduct, he was Mr Swamy's team leader and his immediate supervisor at ARA. The conduct of Mr Percival occurred in a work environment and was facilitated by their relative employment status. I find that the conduct of Mr Percival involved a distinction on the basis of religion that had the effect of impairing the equality of treatment of Mr Swamy in employment. This distinction was not based on the inherent requirements of the job. I find that Mr Percival engaged in an act that constituted discrimination.

5 Recommendations

30. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination in employment, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.⁶
31. The Commission may also recommend:⁷
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person.
32. In this case, there is no suggestion that the complainant has suffered direct economic loss. However, the complainant has made a claim for compensation for 'pain and suffering'. In his application, Mr Swamy said that he was hurt by the conduct engaged in by Mr Percival, that it has caused him significant stress and that he has had difficulty sleeping.
33. In a number of cases brought under Federal discrimination law, courts have awarded general damages for hurt, humiliation and distress. In general, courts have held that awards should be restrained in quantum, although not minimal. In *Hall v Sheiban*,⁸ Wilcox J cited with approval the following statement of May LJ in *Alexander v Home Office*:⁹
- As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.
34. In *San v Dirluck Pty Ltd* (2005) 222 ALR 91, Raphael FM found that the applicant had been subjected to derogatory comments of a racial and sexual nature by her manager at work. His Honour found that while the comments were hurtful, there was no evidence to suggest that the comments were of such severity that they caused the applicant to leave her job. Raphael FM awarded the applicant \$2,000 in general damages.
35. In the present matter, the comments made by Mr Percival were insulting and inappropriate. I accept that they caused significant hurt and distress to Mr Swamy. In the circumstances I consider that an appropriate amount of compensation would be \$2,000. I recommend that Mr Percival pay this amount to Mr Swamy.
36. In addition to compensation, I consider that it is appropriate that Mr Percival provide a formal written apology to Mr Swamy for the conduct identified in this report. Apologies are important remedies in cases of discrimination. They, at least to some extent, alleviate the suffering of those who have been wronged.¹⁰

6 Responses to my conclusions and recommendations

37. On 26 June 2013 I provided a notice to Mr Percival and ARA under s 35(2) of the AHRC Act setting out my findings and recommendations in relation to the complaint dealt with in this report. Along with that notice, I asked whether ARA or Mr Percival has taken or is taking any action as a result of the findings and recommendations outlined in the notice and, if so, the nature of that action.
38. On several occasions since 26 June 2013 the Commission sought a response from Mr Percival and ARA as to whether they would be taking any action as a result of the findings and recommendations in this report. No response was received on behalf of Mr Percival or ARA.
39. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

21 October 2013

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- 1 Committee of Experts on the Application of Conventions and Recommendations (CEACR), *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, International Labour Conference, 101st Session, 2012, Report III (Part 1B), p 312.
 - 2 CEACR, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, International Labour Conference, 101st Session, 2012, Report III (Part 1B), p 312.
 - 3 CEACR, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, International Labour Conference, 101st Session, 2012, Report III (Part 1B), p 330.
 - 4 CEACR, *General Report and observations concerning particular countries*, International Labour Conference, 91st Session, 2003, Report III (Part 1A), p 463.
 - 5 AHRC Act s 35(2)(a).
 - 6 AHRC Act s 35(2)(b).
 - 7 AHRC Act s 35(2)(c).
 - 8 *Hall v Sheiban* (1989) 20 FCR 217 at 256.
 - 9 *Alexander v Home Office* [1988] 2 All ER 118 at 122.
 - 10 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Further Information

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