Fair Work Commission
Workplace Relations
Education Series Lecture

The industrial system, discrimination & judicial method: the Australian reluctance

Associate Professor Anna Chapman
Professor Beth Gaze
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The adverse action provisions

- Bring anti-discrimination fully into workplace law for the first time
- Exception for labour laws: s 40 *Sex Discrimination Act*
- From 1988, elements of connection introduced step by step
  - 1988 A IRC required to take account of principles in the anti-discrimination laws
  - 1992 Sex Discrimination Commissioner could refer discriminatory awards to the A IRC, A IRC required to review them and vary if found (see now s 46PW, AHRC Act)
  - 1993 IRR Act: individual rights introduced, based on International conventions, eg unlawful termination

- First explicit linking: IR Act 1988 (Cth)
- A more thorough linking: IRR Act 1993 (Cth)
  - Objective of ‘helping to prevent and eliminate discrimination’ on a list of grounds.
  - Objective to provide the means for ‘ensuring that labour standards meet Australia’s international obligations’.
  - Processes to ensure that awards and agreements do not include discriminatory content.
  - Unlawful termination provisions.
    - International conventions attached as schedules to the Act
Interpretation of 1993 provisions

  - model anti-discrimination clause for insertion into federal awards; drafted to include both direct and indirect discrimination.

- **Sapevski v Katies Fashions (Australia) Pty Ltd** [1997] IRCA 219:
  - unlawful termination

- **Qantas Airways Ltd v Christie** (1998) 193 CLR 280:
  - unlawful termination (‘inherent requirements’)

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Statutory Framework: Fair Work Act 2009

- Objective to ‘take into account Australia’s international labour obligations’.
- Objective of ‘protecting against unfair treatment and discrimination’.
- FWC to take into account ‘the need to respect and value diversity of the work force by helping to prevent and eliminate discrimination’ on a list of grounds.
- Processes to ensure that awards and agreements do not include discriminatory content.
- Unlawful termination provisions.
  - International conventions removed.
- Adverse action provisions (Part 3-1).
Interpretation of the FW Act provisions:

- Non-discriminatory content of instruments:
  - prior to 2012: unsettled approach
  - From 2012:
    - Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (2012) 205 FCR 227
    - Invitation to reconsider? United Firefighters’ Union of Australia v Country Fire Authority [2015] FCAFC 1
Interpretation of the FW Act adverse action provisions:

- ‘discriminates between’ in s 342(1)
- Attributes listed in s 351(1)
- Ordinary / dictionary meaning?
- Less favourable treatment and a comparator - s 342(1)?
- Indirect discrimination - s 342(1)? *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178
- Intention to discriminate - s 342(1)

- A distinctive approach? *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27
Explanatory factors?

- Constitutional base?
- Reduced reliance on, and visibility, of international conventions?
- The arguments that are being made?
Interpreting the general protections

- Lack of familiarity with basic ideas about discrimination?
  - Such as role of intention and indirect discrimination

- Continuing reluctance to integrate anti-discrimination law?

- Themes:
  - Contrast with comparable countries
    - Europe and UK / Canada and USA
  - Cultural differences between workplace relations and anti-discrimination law / resistance to change?
‘Cultural’ factors

1. Theoretical basis of the field
2. Collectivist versus individualist perceptions
3. Who is the worker of concern
   - mainstream or marginalised?
4. Cultural differences among those who work in the fields
Interpretation again

- But – anti-discrimination ideas have been present in workplace law since 1992, directly related to the anti-discrimination laws
  - Why not draw on these ideas to interpret the general protections?
  - Words used in their ordinary or technical/legal meaning?
- The importance of institutional structures and procedures