



Précis Paper

Actions by Commonwealth Employees for Breaches of the Sex and Racial Discrimination Acts

A discussion about injury to feelings, distress, hurt, humiliation and the like pursuant to the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth) in respect of actions by Commonwealth employees

Discussion Includes

- Background
- Time limits on bringing these types of proceedings
- Damages for injuries to feelings (hurt, humiliation, etc.)
- Standard of proof to be established
- Availability of the action to prospective applicants
- What constitutes an unlawful act under the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth)

Précis Paper

Actions by Commonwealth Employees for Breaches of the Sex and Racial Discrimination Acts

1. In this edition of BenchTV, Desmond Kennedy (Mediator, Kennedy Mediation, Sydney) and Gary Smith (Barrister, Jack Shand Chambers, Sydney) discuss actions by Commonwealth employees in relation to breaches of the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth).

Background

2. Desmond Kennedy SC has substantial experience litigating in the areas of sexual and racial discrimination, particularly because of two major bullying cases he ran:
 - *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377
 - *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310
3. In *Nationwide News Pty Ltd v Naidu*, Mr Naidu recovered an amount in excess of \$2 million for an intentional tort. He won in negligence against his employer at first instance, but ultimately lost in negligence in the Court of Appeal. The case was groundbreaking in the sense that it resurrected a cause of action in intentional tort that was thought to have been fairly dormant for a long time.
4. The plaintiff in the child bullying case of *Oyston v St Patrick's College* was successful.
5. As a result of Des Kennedy SC's successes in these two cases, he was approached to present a paper on bullying/harassment and human rights.
6. In the course of preparing this paper, Des came across the decision in *Poniatowska v Hickinbotham* [2009] FCA 680. This case demonstrates the big advantages to be had in people bringing actions for unlawful breaches of the two relevant Commonwealth Acts in the Federal Court.
7. There are restrictions on Commonwealth employees bringing actions against the Commonwealth, which can be found in s 9 and s 44 (1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), whereby, generally speaking, the employees of a Commonwealth instrumentality are not entitled to seek damages, or recover damages, in respect of injuries arising in the course of their employment. Instead, they are covered by Comcare.

8. S 5A of the Act defines injury to include mental injury. Basically, an action cannot be brought where there is an injury (defined as physical or mental).

What does mental injury really mean?

9. In the preparation of this paper, a well-known and well-recognised psychiatrist provided to Des his view that in order for anything to be a mental injury, it had to fall within DSM 5 (Diagnostic and Statistical Manual of Mental Disorders (5th ed.)).
10. Feelings of humiliation and distress are emotional responses to sexual harassment or racial discrimination, which are both unlawful pursuant to the relevant Commonwealth Acts.

Time limits on bringing these types of proceedings

11. A person who wishes to pursue an action of this type needs to make an application to the Australian Human Rights Commission alleging that they are being discriminated against. The application is then considered by the Australian Human Rights Commission.
12. There are provisions whereby the application can be terminated. In *Poniatowska v Hickinbotham*, it was found that there was no reasonable prospect of conciliation. Once it is terminated (a notice of termination and reason must be given), the claimant in the Federal Court has 60 days in which to bring an action for damages. (There is a provision that allows for an extension of time – but it is advised that this provision only be resorted to if unavoidable, and that practitioners pay close heed to the 60 day limit.)
13. Discrimination could have happened many years previously, which is a ground for its termination. The cause of action arises at the point at which the application to the Human Rights Commission is terminated. This is the point from which the 60 day period commences.

Damages for injuries to feelings (hurt, humiliation, etc.)

14. In the case of *Demo v Scenic Rim Regional Council* [2014], the applicant claimed breaches of the *Racial Discrimination Act 1975* (Cth) on the basis that he was called a 'dumb wog' by a Council employer.
15. It was found that this did constitute racial discrimination. He was awarded \$4000 as compensation for 'general damages, hurt, humiliation and the like' (which ended up not being payable, and the application was dismissed).

16. In the case of *Haider v Hawaiian Punch Pty Ltd* [2015], the applicant alleged that he was racially abused by a bouncer employed by a nightclub, in breach of ss 9, 13 and 18C of the *Racial Discrimination Act 1975* (Cth). The applicant was awarded \$9000 as compensation.
17. In the case of *Richardson v Oracle Corporation Australia Pty Ltd* [2014], an amount of \$18,000 was awarded in respect of sexual discrimination. There had been psychiatric consequences as a result of the sexual discrimination. On appeal to the Full Court, it was ordered the damages to be increased to an amount of \$100,000 on the basis that the amount of \$18,000 awarded by the trial judge was manifestly inadequate, and that community standards now afford a higher level of compensation for damages for pain and suffering and any loss of amenities of life in such cases.
18. In the case of *Murugesu v Australian Postal Corporation & Anor* [2015], \$40,000 was awarded to the applicant for pain, suffering, distress and humiliation. Aggravated and exemplary damages are available in these types of actions.
19. Every case has to be decided on its own facts, and if the circumstances are such that a specific deterrent and punishment is deemed to be required, then the Courts would be capable of awarding a separate sum for both aggravated and exemplary damages.

Standard of proof to be established

20. Racial and sexual discrimination and sexual harassment are serious allegations.
21. In *Qantas Airways Limited v Gama* [2008], the Court found that the Briginshaw test applies. The Briginshaw test is understood, in the context of serious civil matters, and thus the relevant burden of proof that is the balance of probabilities, as requiring 'reasonable satisfaction' in cases where serious allegations have been made or a finding is likely to produce grave consequences. Generally speaking, if an applicant is successful, they will be entitled to their legal costs.
22. Any practitioners intending to advise any of their clients in relation to bringing an action of this type should always make sure that it is pleaded as declaratory relief, damages, costs, and interest.

Availability of the action to prospective applicants

23. It does not seem as if the legislature intended to abolish or remove the right for employees to bring these sorts of actions. In the second reading speech, there is no hint as to what the term mental injury means.

24. These sorts of actions for injury to feelings were first referred to in the decision in *Hall, S. & Ors v A & A Sheiban Pty Ltd & Ors* [1989], which was relied upon by Wilcox J in *Stephenson as Executrix of the Estate of Dibble v Human Right & Equal Opportunity Commission* (1995).
25. Wilcox J said in *Hall*:
- 'Damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation ... to ignore such items of damage simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit injustice upon a complainant by failing to grant relief in respect of a proved item of damage.'*
26. The Justices in the decision in *Hall* relied upon the important English decision of *Alexander v Home Office* [1988] 1 WLR 968, quoting it as follows:
- '...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'*
27. This seems to provide fairly sound authority for the fact that mental injury does not encompass injury to feelings, humiliation, distress, etc.
28. It is important to bear in mind that the Commonwealth, and Commonwealth authorities, make up a very substantial employer throughout Australia, so there are lots of people likely to be affected by these things - things which have the potential to give rise to a cause of action.
29. We are being confronted almost on a daily basis with news reports of people being the subject of racial discrimination and sexual harassment.

What constitutes an unlawful act under the Sex Discrimination Act 1984 (Cth) and the Racial Discrimination Act 1975 (Cth)

30. For sexual discrimination - see s 5 of the *Sex Discrimination Act 1984* (Cth).
31. For sexual harassment - see 28A of the *Sex Discrimination Act 1984* (Cth).
32. For racial discrimination - see s 9 of the *Racial Discrimination Act 1975* (Cth).
33. For 'offensive behaviour because of race, colour or national or ethnic origin' - see s 18C of the *Racial Discrimination Act 1975* (Cth).

BIOGRAPHY

Desmond Kennedy

Mediator, Kennedy Mediation, Sydney

Des has practiced as a barrister in excess of 40 years and as a Senior Counsel since 1999. He has appeared in a number of substantial common law cases and since becoming a mediator has developed expertise in the area to successfully mediate a large number of significant cases. He also carries out mediations generally. Des mediates in all areas of common law including major motor accident cases, defamation cases, medical and professional negligence, workplace injury, workplace and school bullying cases, occupiers liability, intentional torts, statutory compensation, trade practice cases, malicious prosecution, sexual discrimination/harassment and racial discrimination.

Gary Smith

Barrister, Jack Shand Chambers, Sydney

Gary was admitted to practice in 1993 and approached the bar in 2001. He initially worked as a solicitor in Newcastle, practicing predominately common law, motor accidents and criminal law. He obtained a Law Society Specialist Accreditation in personal injury law. Gary appears mainly before the Supreme and District Courts, although also appears in CARS assessments, the Local Courts and various other Tribunals. While practicing mostly in Sydney, Gary also appears regularly in Newcastle, Wollongong and other country areas throughout New South Wales.

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Legislation

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