



## UNLAWFUL DISCRIMINATION IN THE WORKPLACE – EMPLOYERS’ EXPOSURE WIDENS

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DECEMBER 2017

### SUMMARY

To create an environment free from unlawful discrimination, bullying and harassment, employers know they should be prepared to recognise and prevent conduct which might give rise to these complaints in the workplace. But what employers need to also know now is that acting on bad behaviour can itself be unlawful, where that behaviour is a function of an injury or illness.

### UNLAWFUL DISCRIMINATION

#### ***Discrimination and the Comparator Test***

Discrimination (direct and indirect) occurs when a person with a certain attribute (such as age, sex or sexuality, family responsibilities, race, gender, religion, pregnancy, or impairment) is treated **less favourably** than a person without that attribute in the same or similar circumstances. Impairment may include physical, psychiatric, sensory (blindness, hearing loss), and other conditions.

In Queensland though, those “attributes” also include *characteristics* of the attribute. This means that people may be discriminated against on the basis of their “characteristics”.

The following decisions deal with discrimination with respect to a person’s disability, to make the point.

#### ***Purvis v New South Wales (Department of Education & Training) (2003) 217 CLR 92***

In *Purvis v New South Wales (Department of Education & Training)*, the High Court considered an alleged contravention of the *Disability Discrimination Act 1992* (Cth). *Purvis* involved the suspension and expulsion of a school student who had brain damage that led him to behave badly including repeated violence towards students and teachers.

The primary means of assessing discrimination is a comparator test.

The High Court considered that the appropriate comparator is a person not only without the disability, but a person who does not behave in the same way as the disabled person. That is, would the school have acted the same way against a student who behaved in that way, and did not have the disability? The history of violence by the student and the school’s responsibilities to other pupils were relevant, and the school was found not to have engaged in unlawful discrimination, because it focussed on the *behaviour*, not the *disability*.

#### ***Woodforth v State of Queensland [2017] QCA 100***

In May this year, the Queensland Court of Appeal recognised a key difference with Queensland discrimination law, to the law considered in *Purvis*. In

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*Woodforth v State of Queensland*, the Court considered an appeal by a person with a hearing impairment who claimed she experienced discrimination in the way the police responded to complaints she made regarding assault and theft. The applicant's issue was that by failing to receive her police complaints through sign language, she was discriminated against because of her hearing impairment in contravention of the *Anti-Discrimination Act 1991* (Qld) (**AD Act**).

The Tribunal below applied the reasoning in *Purvis*, and said the relevant comparator was a person without the hearing impairment, who would not communicate by conventional speech. On that basis, the Tribunal below found the police had not treated her any differently, and no unlawful discrimination had occurred.

The Court of Appeal held the Tribunal was wrong to apply the reasoning in *Purvis*, because the AD Act is a different Act, which requires consideration also of the *characteristics* of an attribute. The correct analysis required a comparison between her treatment as a person with the hearing impairment (*impairment*) and the inability to communicate effectively by conventional speech (*characteristic*), with a person without that impairment and that characteristic, in the same or similar circumstances.

The decision and the emphasis on the importance of the relevant characteristic, sounds as a warning bell to employers. By way of illustration, where an employee behaves (or misbehaves) in a particular way, and the employee can show the behaviour was a function of their illness, the employer cannot avoid a finding of unlawful discrimination by saying they were focusing on the bad behaviour.

The decision in *Woodforth* reaffirms that discrimination laws remain a complex area for employers to navigate.

It is also important to recall that an employer will be liable for the discriminatory conduct of their employees, unless the employer can show it took reasonable steps to prevent the conduct. What is "reasonable" will differ from employer to employer, depending on the size of the workforce, plus the structure and activities of the business.

#### WHAT EMPLOYERS SHOULD DO

As a minimum, employers should implement the following risk management steps to prevent discrimination in the workplace:

- Develop and implement anti-discrimination workplace policies, and systems of review;
- Educate and train staff (especially managers) as to their responsibilities, and how to identify and

address circumstances exposing the organisation to risk of unlawful discrimination;

- Establish a prompt complaint management procedure; and
- Seek legal advice early, and consider alternative dispute resolution methods with respect to complaints.

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