Briefs

DISCRIMINATION

Dismissive behaviour

CLAIRE HOWELL reports on a recent unfair dismissal case involving indirect discrimination.

The provisions in the *Workplace Relations Act 1996* (Cth) dealing with termination of employment are significantly different to those found in the *Industrial Relations Act 1988*. Among the many changes made, the 1996 Act abolished the Industrial Relations Court of Australia after only three years of operation.

In one of its last decisions, *Sapevski and Others v Katies Fashions (Australia) Pty Ltd* (unreported, 8 July 1997, Patch JR) the Industrial Relations Court of Australia considered and applied the principles of indirect discrimination in the context of redundancy and statutory unfair dismissal.

The *Katies* decision will remain of relevance notwithstanding that it was decided under the former legislation because dismissal on grounds including the sex of the employee remains unlawful under the *Workplace Relations Act 1996*: s.170CK(2)(f). In addition, discrimination may be a relevant factor in considering the overall fairness of the dismissal in proceedings in the Australian Industrial Relations Commission.

The applicants in the *Katies* matter were 20 migrant women from non-English speaking backgrounds. They spoke Macedonian, Croatian, Serbian or Spanish as their first language. Their understanding of English was in most cases limited. The women worked in one of the respondent's warehouses. They were employed as 'splitters and packers', splitting garments which arrived from manufacturers and packing them into boxes for distribution to retail outlets. They had been so employed for up to 20 years. They each worked full time and were paid $402.90 gross a week ($20,950.80 a year).

All of the splitters and packers employed at the warehouse were women. Employees in other manual work at the warehouse were all men.

In 1994 Katies decided it would move the warehouse to new, more automated premises. The splitting and packing functions were the ones primarily affected by automation. At a meeting in November 1994, Katies advised its employees of the move and that all except a small number of splitters and packers would lose their jobs.

At this meeting and at subsequent meetings Katies relied on some of its employees (with no interpreting qualifications) to translate what was being said by management. All of the applicants understood they were to lose their jobs. Perversely, the company, when it finally made the move to its new premises and terminated the women's employment in March 1995, characterised the redundancies as voluntary. The women left with no thank you and no goodbye from Katies, although they did receive modest redundancy payouts as required under the relevant industrial agreement.

It was not until several months after their dismissal the women finally got advice to the effect they could take an unlawful termination claim — long after the then 14 day (now 21 day) period for lodging an application had expired. As a consequence it was necessary for the women to succeed in obtaining an extension of time for the lodging of their applications, as well as on the substantive issues.

In the hearing of the matter it was agreed eight of the applications would be heard and decided (four selected by each side) to shorten the hearing and minimise costs.

The court granted extensions of time to each of the applicants, largely because of the language and cultural barriers the women faced. It held:

> The courts in this country must be assiduous not to visit upon persons in the position of the applicants an injustice because of understandable ignorance of their rights, and confusion and misunderstanding as to what to do.

The court found the terminations to be unlawful on the basis of the principles laid down by the High Court in *Australian Iron and Steel v Banovic and Others* (1987) 168 CLR 165. In *Banovic* the *first on, last off* principle was applied to select employees for retrenchment. The employer had for many years prior to the retrenchments had a discriminatory recruitment policy which had the effect of reducing the number of women in its workforce. The policy had been abandoned some years prior to the retrenchments but its effect was that a disproportionate number of women were retrenched. The High Court found the actions of the respondent constituted indirect discrimination for the purpose of the *Anti-Discrimination Act 1977* (NSW).

In the *Katies* matter a breach of s.24(1)(b) of the *Anti-Discrimination Act* through indirect discrimination was also identified. The court arrived at this process by following a four-step process. First, it identified a 'requirement or condition' that in order to remain in employment the women must not be classified as splitters and packers; second, it concluded that this requirement or condition impacted only on female employees; third it held that this requirement or condition was not reasonable; and fourth it held that the applicants were unable to comply with the requirement.

These findings were made because the unchallenged evidence showed that Katies had an informal policy of putting men only in certain positions which supposedly required heavy lifting. No-one in positions of this type (including unloading cartons, unloading racks of hanging garments, tying and bagging garments) had been made redundant. Yet the applicants gave evidence they did normally lift significant weights in the course of their work. The court concluded: 'the rigid division of jobs resulted in a far greater proportion of women workers being made redundant than men'.

Ultimately it was held the terminations were not for valid reason as required by s.170DE(1) of the Act because they were in breach of relevant State legislation. It was also held the applicants were dismissed for reasons including their sex, in breach of s.170DF(f) (equivalent to the present (s.170CK(2)(f)) of the *Workplace Relations Act 1996*. Section 170DF(f) was held to include both direct and indirect discrimination.

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