Human Rights: Landmark decision in Aboriginal wages case

Broad scope of prohibition on discrimination

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The decision of the full Federal Court in Baird v State of Queensland [2006] FCAFC 162 is an important development in the ongoing struggle of Indigenous people to right historical wrongs relating to the underpayment and non-payment of wages.

More broadly, the case highlights the breadth and flexibility of the prohibition against racial discrimination contained in s.9(1) of the Racial Discrimination Act 1975 (Cth) (RDA).

In the appeal decision Allsop J stressed the need to interpret the RDA broadly and beneficially in accordance with the purpose of eliminating racial discrimination in all its forms and manifestations. His Honour also emphasised the need to approach s.9(1) "as comprising a composite group of concepts" and without "legalism and formality antithetical to the broad aims of the section and the Convention".[1]

Avoiding legalism and formality does not, however, mean that the elements of s.9(1) need not be proven and the case illustrates the importance of clearly addressing the requirements of the section.

Baird

Baird concerned the underpayment of wages to Aboriginal people living in the Hope Vale and Wujal Wujal communities in Queensland. Those communities were managed, in the relevant period, by the Lutheran Church (the church) which was funded by the Queensland Government (the government) for this purpose.

It was alleged that the appellants had been paid at a lower level to

that of other people performing similar work for the government and/or at a level below relevant award rates. This was claimed to be racially discriminatory. The claim covered the period from 1975 when the RDA commenced until 1986 (at which time Aboriginal people living on government and church-run communities were paid award wages).

Case

At first instance, the appellants had argued that the government was responsible for the discrimination either:

- as the employer, through the agency of the church, contrary to s.15 of the RDA (which prohibits discrimination in employment); and/or
- through the act of paying grants to the church which were calculated to include a component for wages to be paid at under-award rates, contrary to s.9(1) of the RDA, which provides: "It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life".

Significantly, the church was not a respondent to the case. Furthermore, the appellants' case did not (for reasons unclear) include an argument of ancillary liability under s.17 of the RDA which makes it unlawful for a person to "assist or promote whether by financial assistance or otherwise" the doing of an act of racial discrimination.

At first instance, Dowsett J found against the appellants on both aspects of their case.[2] He found that the church, not the government, employed the appellants and that it did so in its own right. The claim under s.15 of the RDA therefore failed.

Further, his Honour found that there was no basis for asserting that the calculation of the grants involved a discriminatory element, nor for finding that the payment of grants had the "purpose or effect of depriving the applicants of their proper pay rates".[3]

The claim under s.9(1) was therefore also unsuccessful. Significant to his Honour's reasoning in relation to s.9(1) was the following: "The government was under no obligation to make payments to the church for use on the missions. No doubt, in discharge of its duty to maintain peace, order and good government throughout the state, it had an interest in seeing that the missions were well run. Clearly, it considered that the payment of grants would contribute to that outcome. However, it is difficult to see how the payment of a grant could involve a relevant discriminatory element based

on race. Such payments were, in themselves, entirely neutral, save for the fact that they were intended to benefit Indigenous people ... [t]here is no suggestion that other grants were made at higher rates to facilitate higher payments to non-Indigenous workers. As to discrimination in calculating the amount of each grant, there is no evidence that the government calculated payments to other organisations using higher wage rates. The applicants have established that the grants were not sufficient, themselves, to enable the church to pay award wages, but there is no basis for asserting that the calculation of the grants involved any discriminatory element."[4]

Appeal

The appellants were successful in their appeal, which focused on the decision in relation to s.9(1).5 Allsop J (with whom Spender and Edmonds JJ agreed) found that Dowsett J had erred in requiring the appellants to:

- demonstrate an obligation for the government to make payments to the church; and
- provide a "real-life comparator" or comparison against which to assess the "discriminatory element".

The court held that neither aspect is a necessary element of s.9(1). Allsop J noted the international context of the RDA, which is based on the International Convention on the Elimination of all Forms of Racial Discrimination. His Honour noted that the purpose of the Convention and the RDA is the "elimination of racial discrimination in all its forms and manifestations – not merely as manifested by people who are obliged to act in a particular way", and that to achieve this broad purpose "requires broad and elastic terminology".[6]

Allsop J also noted that s.9(1) does not require a direct comparison to be available to demonstrate discrimination. His Honour observed that "those suffering the disadvantage of discrimination may find themselves in circumstances quite unlike others more fortunate than they".[7]

The three significant questions in the matter were identified as being:

- whether the calculation and payment of grants involved the setting of a sum for payment of wages based on below-award rather than award wages;
- whether that 'distinction' between rates used in calculation was 'based on race'; and
- whether this had the effect of impairing human rights as required by s.9(1).[8]

Finding of discrimination

The full court found that on the facts as determined by Dowsett J, a breach of s.9(1) was made out. The acts of calculating and paying the grants by the government clearly involved a distinction between award wages and below-award wages. Such distinction was made by reference to the Aboriginality of the persons on reserves who were to be paid out of those grants.

This connection was evident from the Cabinet submissions concerning the grants and could be inferred from the findings that the government:

- paid below-award wages to Aboriginal workers on the reserves that it administered directly;
- calculated grants including a sum for wages based on below-award wages being paid to Aborigines on church-run reserves; and
- paid award wages to its own employees who were not on reserves.

The full court also concluded that the act of the government had the effect of impairing human rights: "In circumstances where the state knew that it was not financially feasible for the church to pay substantially more in wages on the reserves than the amounts allowed for in the grants and where the state calculated the grants in part by reference to below-award wages, the acts of the state involving the distinction based on race can be seen to have had a causal effect on the impairment of the right of the appellants as recognised by Article 5 of the Convention to equal pay for equal work."[9]

Following the decision of the full court, the parties agreed to orders which included the payment of damages to individual appellants of between $17,000-$85,000 (including interest) and an apology from the Minister for Communities, Disability Services, Seniors and Youth.[10]

Implications

The decision of the full court confirms the broad scope of the prohibition on discrimination in s.9(1) of the RDA. The section covers discretionary acts and the obligation it imposes on them is clear: if you choose to act in an area of public life covered by the RDA, such actions must not discriminate on the basis of race.

It is not necessary to show that other people have, in fact, been treated more favourably to show racial discrimination. In practice, such a comparison will often be helpful in demonstrating the required connection between the impugned act and a person's race, but it is necessary to focus on the terms of s.9(1) and this does not impose any requirement that there be an 'actual comparator'.

Although the case against the government was not argued as one of ancillary liability contrary to s.17 of the Act, the successful outcome demonstrates the broad scope of the prohibition in s.9(1) and its coverage of acts based on race that have both direct and indirect

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effects.

However, the decision also highlights the importance, in making out a claim under s.9(1), of clearly identifying:

- the impugned act (here, the calculation and payment of grants);
- the "distinction, exclusion, restriction or preference" said to be involved in that act (here, the distinction between award wages and non-award wages used to calculate the grants);
- the bases of that decision, including a basis in the race of the applicant;[11] and
- the effect (including an indirect effect) that the act has upon the human rights of the applicant.
- Such attention to the requirements of s.9(1) remains vital to avoid being seduced by what Allsop J described as the "elusive simplicity" of the section.[12]

Endnotes

1. [2006]FCAFC 162, [61]-[62]. The Convention is the International Convention on the Elimination of all Forms of Racial Discrimination.
2. Baird v State of Queensland [2005] FCA 495.
3. Ibid [138]-[142].
4. Ibid [138].
5. The Human Rights and Equal Opportunity Commission (HREOC) was granted leave to intervene in the appeal. The author appeared for HREOC with Nick Poynder of counsel. HREOC's submission are available at www.humanrights.gov.au/legal/intervention/baird.html.
6. [2006] FCAFC 162, [62] emphasis in the original.
7. Ibid [63] (Allsop J).
8. Ibid [65] (Allsop J).
9. Ibid [74] (Allsop J).
10. Baird v State of Queensland No 2 [2006] FCAFC 198.
11. Race only needs to be a reason for the decision – it need not be the dominant or substantial reason: s.18.
12. [2006] FCAFC 162, [29].

PROFESSIONAL STANDARDS

A Practitioner's duty to an unrepresented opponent

BY JOSEPHINE STONE, PROFESSIONAL STANDARDS AND ETHICS, JULY 2007

Recently, the Society has received a number of complaints from unrepresented litigants (mostly in Family Law disputes) that the opposing solicitor has failed to observe professional standards in their communications. What are those professional standards?

Practitioners should be aware of Professional Conduct Rules 17.35 to 17.42 which deal with a practitioner's duty to an opponent and Rule 26 which deals with communications to third parties. All practitioners would be aware that a practitioner must not deal directly with the client's opposing party unless the practitioner has first established the opponent is unrepresented and consents to such dealings. The difficulties arise out of the opponent's perceptions of the role of the practitioner in these situations.

The work of a Family lawyer, whether contentious or non-contentious, is adversarial. It is the duty of the practitioner to safeguard and advance the interests of his own client and that state of affairs is inconsistent with any suggestion that a duty of care is owed to opposing parties: per Cordery on Solicitors at J159. The exceptions are rare eg. costs thrown away where the defaulting solicitor has a liability to the opposing client (pursuant to an order of the court) or in criminal proceedings the prosecutor may be subject to a duty of care to the accused in certain circumstances. Such exceptions are based on a primary duty to the Court.

When you think about this it all makes sense. A practitioner who owes a duty of care to his/her client and the opposing party has a conflict of interest. After all, he/she cannot serve two masters. He/she cannot protect his client's interests and that of the person with whom the client is in conflict. All the opponent can ask of the opposing party's practitioner is that the practitioner does not deliberately mislead them by false statements: see also Rules 17.40 and 17.42.

It may be clear to the practitioner to which party he/she owes loyalty, but how do you get this message across to the unrepresented opponent? Some practitioners refuse to communicate with the opponent by telephone, preferring the relative safety of written communications. However, it isn't always possible or feasible to avoid telephone communications.

Suggested tips in dealing with unrepresented litigants

1. State from the outset, in writing, that your duty is to your client, not the opponent.
2. Recommend the opponent seek legal advice. Most Legal Aid Commissions will provide free clinic or telephone advice.
3. Use non-threatening language eg. "it is our position that the court order means....and if you disagree with our position you should seek legal advice from your own solicitor", rather than "the court order means this...and I'll take you to court if you don't comply".
4. Take heed of Rule 17.40 which requires cognisance of the opponent's unrepresented state in court matters.
5. Make a file note of every telephone or personal communication with the opponent. It may even be prudent in certain cases to send a copy of the file note to the opponent. The initial cost to you or your client may save you considerable time and expense later on.