

# TREATING OLDER WORKERS FAIRLY

► PHILIP LYE

## 'AGE SHALL NOT WEARY THEM'... BUT WHAT ABOUT THE BOSS? HOW ENTRENCHED IS AGE DISCRIMINATION IN THE WORKPLACE?

In an age of supposed enlightenment where employers and employees are deluged by a raft of information about the relevant laws, you would think that discrimination would be almost non-existent in Australia. This is not the case.

I have always found discrimination to be subtle in its various guises and in some industries it has become an art form. Whether it's to do with gender, race or sexual preference or concerned with age-related issues, it continues unabated.

Recently there has been much discussion about the problems facing the Australian workplace environment as we look to the next five to 10 years – the struggle to retain talent, the threat of increased litigation, an increasing focus on governance and having to cope with the 'burn and churn' of yesteryear. It is true that dynamics and demographics are rapidly changing in today's marketplace, and we need to take stock now and make provision for the environment in which we are likely to find ourselves in the future. Delay will mean potential failure, and making some fundamental mindset changes now has become critical if we are to continue as the 'Lucky Country'.

Our problem seems to be a lack of focus on positive agendas, policies and working collaboratively towards fully harnessing our untapped potential – our older workers.

### ON THE OUTER

Many older workers have been 'outplaced', 'put out to pasture', 'let go' or otherwise out-used, shafted and retired when they were often at their most productive. Yet many of these people have valuable skills that they would gladly share with some willing mind if they had the opportunity. We cannot afford this 'brain-drain' and waste of talent.

Such a negative view of age (and conversely the over-inflated value placed on all things youthful) is out of balance with society and comes at a great cost to our nation. Many of us would agree that money cannot buy commonsense, wisdom, maturity and experience; however, we have largely only paid lip service to this fact.

In recent times, there have been an increasing number of cases appearing before the Equal Opportunities Commission where age has been a factor. On many occasions, a company that enforced retirement and was subsequently found to engage in discrimination has landed in hot water and been severely penalised when it has acted outside the law.

Take the following true example (names and details have been altered to protect all parties).

**OUR PROBLEM SEEMS TO BE A LACK OF FOCUS ON POSITIVE AGENDAS, POLICIES AND WORKING COLLABORATIVELY TOWARDS FULLY HARNESSING OUR UNTAPPED POTENTIAL – OUR OLDER WORKERS.**

### PUT OUT TO PASTURE

'Ben' worked for a manufacturer in Queensland for 25 years. He had virtually never taken sick leave, always arrived early for work and was known to be hard-working.

One Friday morning Ben was summoned to the warehouse manager's office and told that he was no longer employed. This was apparently due to 'operational incapacity to provide him with sufficient work', or so it was explained.

Ben took his cheque and slunk out the door. He had, however, requested a reference and was told that if he cared to call back the

following Friday he could collect one from the office.

The following Friday, Ben went back to collect his reference. As he checked in at the warehouse he noticed two new faces, both men who appeared to be in their late twenties. On asking around Ben discovered they had begun work at the company five days earlier. He subsequently spoke to them and they confirmed they had begun work after his departure.

Ben wasn't happy! He was convinced he had been lied to.

### THE CASE

Ben lodged a complaint with the Anti-Discrimination Commission – the legislative body in Queensland, which is the equivalent of the Equal Opportunity Commission operating in other Australian states – believing that he had been discriminated against because of age.

In compliance with her obligations under the Act, the Commissioner investigated the complaints and endeavoured to resolve them by conciliation. She was not successful and advised Ben of this fact.

He then requested that she refer his complaint to the Anti-Discrimination Tribunal. This was done under cover of a referral report. In accordance with its authority under s 179 of the Act, the Tribunal arranged a formal hearing.

### THE HEARING

Ben attended the anti-discrimination tribunal hearing with his adviser and sat opposite his previous employer and their advisers.

The commissioner began her opening preamble by stating the matter to be heard and what it involved. Ben's adviser stated his client's position: that Ben believed he had been subject to discrimination based on age and the reason given for retirement was a sham and a lie.

The proceedings lasted four days with the commissioner listening to both the claimant's and respondent's positions, which included tabling of documentation, affidavits and other evidence.

### THE FINDINGS

The Commissioner stated her findings in the following words: "I am satisfied on the evidence before the Tribunal that a substantial reason for the dismissal of Mr Ben Brown was his age and I find that in dismissing him on 21 May 2003 the respondent contravened the Act."

## ASSESSING DAMAGES

The commissioner went on to say, "In light of the findings I have made, the complainant is entitled to an amount that the Tribunal considers appropriate as compensation for the loss and damaged occasioned by the respondent's contravention of the Act."

Section 209(6) of the Queensland Act provides that 'damage' includes "the offence, embarrassment, humiliation and intimidation suffered by the person".

The principles to be applied in assessing damages under s 209 are as follows:

- ▶ The question to be addressed so far as injury to the feelings and humiliation is concerned is a factual one: what was the effect on the complainant of the conduct complained of?
- ▶ The reference to compensatory damages means that the measure of damages for unlawful discrimination is similar to the measure of damages in tort.
- ▶ The complainant in each case should be put in the same position which, so far as an award of money can do it, he would have been in if the act of discrimination had not occurred.

Damages for Ben were assessed as follows:

1. For the hurt and distress suffered:	\$7500
2. Special damages for loss of income (wages, superannuation contribution and annual leave loading):	\$27,401
3. Compensation for future loss of earnings:	\$40,000
4. Interest assessed:	\$1513
<b>TOTAL</b>	<b>\$76,414</b>

## LIVING WITH THE LAW

The various federal and state laws set out clearly what conduct is discriminatory. With respect to age, there are steps you can take to demonstrate that you are serious about discrimination when composing your business policies, procedures and employment contracts. The following are a few suggestions that will help you avoid costly mistakes like this real-life example.

1. Include a section in your employment policies/contract that determines the basis for working at your organisation. For example: *Retirement Policy – The basis used to assess a person's ongoing employment with us is competence, evaluated through performance review processes. No employee is required to retire from employment, or be asked to retire, or be caused to retire on the grounds of an employee's age.*

2. Provide ongoing performance reviews and training and development.
3. Deal with any performance issues immediately and confidentially.
4. If you have done the wrong thing, get advice and try and settle the matter before it goes too far.

## FINALLY...

Direct or indirect discrimination on the basis of age or any other attribute covered by the Act is unlawful and you face stiff penalties if you break the law.

When you take into account the damages Ben received, the fact that the Commission ordered his legal costs paid together with the costs of the respondents, the employer was over \$150,000 out of pocket. This was a costly and painful lesson for the employer, yet by taking some simple steps they could have avoided the whole debacle and a date with the bank manager. **NA**

## What does the law say?

Under federal and state anti-discrimination laws, it is against the law to treat you unfairly because of your:

- sex
- relationship or parental status
- race
- religious belief or activity
- political belief or activity
- impairment
- trade union activity
- lawful sexual activity
- pregnancy
- breastfeeding needs
- family responsibilities
- gender identity
- sexuality
- age.

### WHAT IS DISCRIMINATION?

Discrimination occurs when someone is treated unfavourably because of one of their personal characteristics. Discrimination may involve the following:

- ▶ judging someone on their political or religious beliefs rather than their work performance

- ▶ offensive jokes or comments about another worker's racial or ethnic background, sex, sexual preference, age, disability or physical appearance
- ▶ display of pictures, computer graphics or posters which are offensive or derogatory
- ▶ expressing negative stereotypes of particular groups, e.g. 'married women shouldn't be working'
- ▶ using stereotypes or assumptions to guide decision-making about a person's career.

### DISCRIMINATION IN THE WORKPLACE

Section 15.1 of the Queensland Act (similar legislation exists in each Australian state or territory) says:

A person must not discriminate in any of the following ways:

- ▶ in any variation of the terms of work
- ▶ in denying or limiting access to opportunities for promotion, transfer, training or other benefit to a worker
- ▶ in dismissing a worker
- ▶ by denying access to a guidance program, an apprenticeship training program or other occupational training or retraining program
- ▶ in developing the scope or range of such a program
- ▶ by treating a worker unfavourably in any way in connection with work.

The Act prohibits both direct and indirect discrimination. In Ben's case the allegations were of direct discrimination.