JOBWATCH

Employment Rights Legal Centre

ADDENDUM TO MAY 2003 SUBMISSION

Productivity Commission Inquiry into the *Disability Discrimination Act 1992* (Cth)

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Job Watch Inc. July 2003

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Introduction

In Job Watch's submission to the Productivity Commission in May of this year, we sought to highlight the following:

1 The real experience of Victorian workers with disabilities. It is the view of Job Watch that the exploration of case studies is a powerful tool in understanding the strengths and weaknesses of governing legislation. Most people can understand and identify with a case study, rather than dry technical language.

The case studies show:

a) The difficulty in proving a complaint of disability discrimination.
b) The relationship between the DDA and the Workplace Relations Act 1996. That is, the positive impact of the DDA when the Workplace Relations Act does not protect an employee who is on probation, or is a short-term casual or trainee.
c) The relationship between the DDA and the Accident Compensation Act 1985 (Vic). That is, the possibility of a claim under the State Legislation and the DDA.

2. The need for community education and awareness.

3. The key issues arising from the employment of workers with disabilities in Business Services and the role of the Supported Wage System.

This submission is an addendum to the May submission expanding upon existing recommendations and making further recommendations.

Addendum - Main Points

1 . The Educative Role of HREOC

Job Watch believes that in Victoria, HREOC does not have a high profile. The function of HREOC is little known, as is its published material which may not be generated often and 1 or is not distributed regularly and widely. The function and work of HREOC must be publicised extensively so that there is a nationwide understanding of its existence, purpose and accessibility.

There is anecdotal evidence that Victorians often access EOCV because they are not aware of an alternative option through HREOC.

There are many means of improving HREOC's profile including use of the media, community awareness campaigns, extensive publications and production of resources such as a conciliation video. Job Watch is to commence filming with HREOC a Conciliation Process video in September of this year. The video shall be circulated extensively.

2. Compulsory Conciliation Conferences

Making a complaint and following it through to final determination by way of hearing is extremely onerous. Responding to a complaint and seeing it through to its final determination by way of hearing is extremely onerous. Add to the equation, a complainant with a disability and the onerous aspect for the complainant is amplified. It is in the interests of the complainant and the respondent that a matter be resolved as soon as possible. The disabled complainant in particular must not be disadvantaged in the complaint process. On this basis, Job Watch recommends that conciliation conferences at HREOC should be made compulsory. Full discovery should also take place prior to the conciliation, and parties obliged to cooperate fully with HREOC's investigation process.

3. Compulsory Mediation for Complainants with a Mental or Psychological Disability

It is the experience of Job Watch that people with mental or psychological disabilities struggle with all aspects of the complaint process. Having such a disability, experiencing discrimination, and facing the consequences of that discrimination such as a loss of job, is a huge burden for the complainant to bear. Providing instructions, attending the conciliation conference are all difficult stages for a person with a mental or psychological disability. Proceeding to hearing for some is not an option.

In cases where the complainant's disability is in total or in part mental or psychological, Job Watch recommends that compulsory mediation take place prior to the matter proceeding to hearing. That is, a two-stage attempt to resolve the matter, firstly by compulsory conciliation and then by compulsory mediation. If the matter is not resolved at mediation, the complainant can determine whether an application is to be made to the Federal Court / Federal Magistrates Court.

It is imperative that a compulsory conciliation and a mediation process be introduced to increase the chances of a matter with merit being able to be resolved at these earlier stages.

4. Expansion of HREOC's role in the Complaints Process

As noted, there are significant barriers for complainants pursuing matters under the DDA.

Case Study

Job Watch recently assisted "Sophie," a senior level personal assistant in a large corporation, who suffers from depression. After 10 months in her employment Sophie's employer approached her and said that although there were no problems with her performance, "It wasn't working out" so the company was prepared to offer her a separation package in exchange for her resignation. Sophie believes that her disclosure to her employer of her depression was a significant factor in his decision to terminate her employment. Sophie wished to stay in her job, however she realised that it would be untenable. We advised her of alternatives under anti-discrimination and industrial legislation and offered to provide her with representation.

After some consideration Sophie elected to accept the separation package and not pursue action against the employer. She instructed that she really wanted to take action as she was extremely upset, had lost her job and felt her employer had "done the wrong thing". Unfortunately however, she said that she believed that she could not withstand the pressures of taking the large employer on and did not want to be the subject of what she expected to be a rigorous and aggressive defence. She was also very concerned that the company would draw the process out and cause her to incur significant costs.

Job Watch submits that the achievement of the objects of the Act would be assisted if HREOC's power to initiate complaints were reinstated. This would provide Complainants with an alternative avenue to pursuing complaints themselves. It would also assist to ensure greater compliance with the Act and could improve the efficiency of the Commission as it would reduce the number of unmeritorious complaints initiated.

We further recommend that HREOC take a more active role in assisting parties to reach agreement within the conciliation process. One of the ways that this could be achieved is through a more vigorous investigation process. We suggest that both parties be required to produce relevant evidence and disclose all pertinent information. This would assist both parties to make a more informed decision about how to proceed with the matter. It would reduce the likelihood of unmeritorious Complaints proceeding to potentially very costly and complex Federal Court proceedings.

5. Cost Consequences for Unsuccessful Litigants

The cost implications at present are unclear for complainants pursuing a claim in the Federal Court 1 Federal Magistrates Court.

Job Watch recommends that human rights applications should not attract the normal principles of the law of costs following the event which apply to the court system. The position as applies in other equal opportunity jurisdictions should apply. That is, unless a case is regarded as frivolous or vexatious, complainants can expect to have to bear their own costs, even if they lose the case. See, for example, Section 109, Victorian Civil Administrative Tribunal Act 1998 (Vic). Having a disability can in itself be a deterrent in pursuing a claim. Complainants should not have an additional deterrent of the prospect of a costs award against them.

6. Guidelines / Advisory Notes

Job Watch maintains that the DDA is a complex piece of legislation. It is difficult for the DDA to fulfil its educative role if the Act is incomplete in its definitions, lacks clarity and is not easily understood. Without clarity, there is less certainty about the outcome of a complaint. In reviewing some recent case law, it became apparent that given the lack of definition and clarity in points of proof such as "unjustifiable hardship", "reasonable adjustment" and "inherent requirements", advising clients on the likely outcome of their disability discrimination case is extremely difficult.

Guidelines/Advisory Notes are essential and should be a major priority for HREOC. The guidelines should be easy to read with an extensive use of examples (covering all aspects of the DDA). At present, "Frequently Asked Questions" serves as the educative material in the area of employment. This information is difficult to understand, provides little or no practical examples which an employer can relate to and is not at all user-friendly. The "Frequently Asked Questions" information should not take the place of guidelines in the employment area.

In the guidelines, more guidance can be provided on:

- disability;
- inherent requirements;
- unjustifiable hardship;
- reasonable adjustment;
- requests for information.

The inclusion of a checklist and a summary would be helpful. The guidelines could take the format of Villamanta publications such as "Using Disability Discrimination Law: A *Booklet for People Who Have a Disability".* HREOC's Pregnancy Guidelines are an invaluable resource with an excellent format.

7. Guidelines/Advisory Notes vs Disability Standards

Job Watch recommends the development of guidelines/advisory notes as opposed to disability standards. The DDA contains some broad definitions and also lacks definitions in some key areas. Greater detail about what is required by the DDA would provide clarity and consequently certainty. Disability standards which are mandatory standards, would certainly provide clarity and certainty. However, they can create a degree of inflexibility allowing for only narrow interpretations of sections and removing the broad scope of the Act and the creativity and adaptability needed in a changing work environment. Job Watch favours the development of guidelines 1 advisory notes which provide a greater understanding and guidance about what is required by the DDA and retain the necessary flexibility for the proper application of the Act.

8. The Financial Burden of Reasonable Adjustment

Job Watch recommends that where a reasonable adjustment needs to be made for a disabled worker, in the case of a large corporation (large corporation needs to be defined), the corporation should pay the costs of the reasonable adjustment. Where the reasonable adjustment is required of an employer who is not a large corporation, the cost of the reasonable adjustment should be paid by a Federal Government funded scheme set up for this purpose. The employer could make application to the Government for the assistance, or alternatively seek reimbursement for the expenditure. To avoid delays, another option is for the Government to provide assistance on an estimate of the cost to the reasonable adjustment with the onus on the employer to provide comprehensive details with supporting documentation as to the necessity for the reasonable adjustment and the associated cost. With a Government funded scheme, the disabled worker, employer and the community in general benefit. As opposed to the payment of a pension which only provides financial benefit to the worker.

9. Proactive Compliance System

At present the DDA operates on a complaints driven basis. That is, an employees responsibility comes under review by virtue of the complaint of an individual. This is a reactive approach. That is, attending to the issue after the event. A proactive approach is required in the DDA to enforce compliance with disability standards. Job Watch recommends a Proactive Compliance System which requires the employer to plan and devise a system which prevents disability discrimination, and which system is not dependent on the making of a complaint. Part of the employer's plan as a prevention mechanism should include putting policies and procedures in place. HREOC could assist employers to develop an appropriate compliance system. The system would then be monitored and audited. Failure to adhere to the compliance system would result in the issuing of a compliance certificate. If there was no improvement in accordance with the compliance certificate, the matter would be prosecuted.

The objective of the proactive compliance system is to assess the work environment and plan and implement preventative measures. This plan is then required to be adhered to with recalcitrant employers subjected to compliance checks and ultimately if appropriate, prosecution.

10. Retention of Arrangements for HREOC's Intervention in Court Proceedings

Under section 11 (1)(o) of the *Human Rights and Equal Opportunity Commission Act 1986,* HREOC may, where it *"considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, intervene in proceedings that involve human rights issues. "*

Job Watch strongly supports this role as it allows the Court to consider additional material and arguments which promote human rights but which may not otherwise be put forward by the parties to the proceedings.

We therefore note, with concern the introduction of the *Australian Human Rights Commission Legislation Bill* to the Commonwealth Parliament on 27 March 2003, specifically the provision requiring HREOC to seek the Attorney-General's consent before it intervenes in legal proceedings involving human rights and discrimination issues.

We are concerned that HREOC's independence in the exercise of its "intervention powers" will be undermined by this proposed legislation, as the Commonwealth has been a party to a number of the matters in which HREOC has been granted leave to intervene.

11. Requests for Discriminatory Information

Section 30 of the DDA provides that:

If, because of another provision of this Part (other than section 32), it would be unlawful, in particular circumstances, for a person to discriminate against another person on the ground of the other person's disability, in doing a particular act, it is unlawful for the first-mentioned person to request or require the other person to provide, in connection with or for the purposes of the doing of the act, information (whether by completing a form or otherwise) that persons who do not have a disability would not, in circumstances that are the same or are not materially different, be requested or required to provide.

In the first instance we suggest that this clause we re-worded to make it easier to understand. We believe that the wording (see below) of section 100 of the *Equal Opportunity Act 1995 (Vic)* is preferable.

100. Prohibition on Requesting Discriminatory Information

(1) A person must not request or require another person to supply information that could be used by the first person to form the basis of discrimination against the other person.

(2) For the purpose of sub-section (1) it is irrelevant whether the request or requirement is made orally, in writing, in an application form or otherwise.

101. Exception - Information Required for Non-Discriminatory Purposes

A person does not contravene section 100 if the information is reasonably requested or required for a purpose that does not or would not involve or lead to a contravention of this Act.

We support the inclusion of this prohibition in the Act, however we have concerns about the effectiveness of the process for ensuring compliance.

We have received a number of complaints from callers to our advice service in relation to discriminatory questions they have been asked during the job application process. These have ranged from questions about previous injuries to queries about the general state of their health and history of mental illness.

Most people have an innate sense that they should not be asked these questions, however they don't know what to do if they have been asked. In general, callers to Job Watch want to know whether they have any redress if this has occurred. When we explain that it is possible to lodge a complaint with HREOC or the EOCV about this, they often indicate that they don't necessarily want to take any action themselves about this, rather they want to know whether a potential employer "can do this" and how they can be stopped from doing this to someone else.

From a potential complainant's perspective, there are some clear reasons not to pursue such claims; in some cases it will be difficult to demonstrate economic loss attributable to the unlawful questioning, in other cases it may be hard to prove that the conduct occurred.

It is submitted that a potential complainant should be given the alternative of reporting a complaint to HREOC setting out the circumstances in which discriminatory information has been requested. If the Commission believes that there has been a prima facie breach of section 30, the Commission should write to the employer which:

1 . Advises that a complaint has been made alleging that discriminatory information has been requested;
2. States that on the basis of the complaint, it appears that the employer may have acted unlawfully;
3. Sets out the requirements of the DDA;
4. Requests that employer refrain from such conduct in future; and
5. Advises that action may be taken by HREOC against the employer in the event of any future breaches.

This process would serve several purposes, namely it would satisfy the complainant's request that "something be done," save complainants from going through the Complaints process, assist in the education of employers and advance the objects of the Act.

12. Supported Wage System

Our primary submission sets out some of the key issues arising from the employment of workers with disabilities in Business Services (or sheltered workshops) and puts forward our view of the Supported Wage System (SWS).

For the purposes of this addendum, we confirm our support for the SWS within business services and also in "open," that is, mainstream employment.

We endorse the use of the SWS for a number of reasons, which include:

- its acceptance by the Australian Council of Trade Unions, the Australian Chamber of Commence and the Federal Government, which lead to adoption of a model award clause[1];
- that it is independently administered by the Commonwealth Department of Family & Community Services (FACS);
  it enables employers to employ workers with reduced productivity and pay them in accordance with their independently assessed productivity;
  it has the support of a wide range of disability advocacy groups;
  it uses fair and objective procedures which involve accredited SWS assessors; and
  its provides for annual reviews of a worker's productivity.

Awards generally provide for a wage calculation mechanism based on the "test case standard". However, there is no requirement for the Australian Industrial Relations Commission or State industrial tribunals to only certify agreements or make awards that contain the model SWS clause. We therefore suggest that the DDA be amended to require the AIRC and State Tribunals to only certify agreements and make awards providing this clause.

In our view this strengthens the protection afforded to workers with disabilities in a manner consistent with the objects of the DDA.

We recommend that consideration be given to amending section 47(1) as follows:

a) this Part does not render unlawful anything done by a person in direct compliance with:
b) an order of a court, or
c) any of the following:

(i) an order or award of a court or tribunal having power to fix minimum wages,
(ii) a certified agreement (within the meaning of the Workplace Relations Act 1996);
(iii) an Australian workplace agreement (within the meaning of the Workplace Relations Act 1996 ;

To the extent that the order, award or agreement has specific provisions relating to the payment of rates of salary or wages to persons, where:

(iv) if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and
(v) the salary or wages are determined ***in accordance with the Supported Wage Assessment tool****.*

1 This test case standard is a standard clause developed by the Australian Industrial Relations Commission in its Supported Wage System Case [10 October 1994 Print L5723].

Summary of Recommendations

1. Improve HREOC's profile.
2. Provision for compulsory conciliation conferences.
3. Provision for compulsory mediation for complainants with a mental or psychological disability.
4. Expansion of HREOC's role to initiate complaints and to facilitate a greater investigative function.
5. Limit cost orders in Federal Court/Federal Magistrates Court to frivolous/vexatious claims.
6. Development of guidelines/advisory notes as opposed to disability standards.
7. The financial burden of reasonable adjustment to be borne by large corporations and the Federal Government.
8. Provision in the DDA for a Proactive Compliance System.
9. Retention of HREOC's power of intervention in proceedings.
10. Simplify S.30 of the DDA - Requests for Discriminatory Information.
11. Provision in the DDA for the reporting of a complaint to HREOC which HREOC is to pursue.
12. Amendment of S.47 (1) of the DDA to require the AIRC and State Tribunals to only certify agreements or make awards that contain the model Supported Wage System clause.