



Australian
Human Rights
Commission

BD v Queensland (Department of Community Safety)

[2013] AusHRC 61

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BD v Queensland (Department of Community Safety)

Report into discrimination in
employment on the basis of criminal
record

[2013] AusHRC 61

Australian Human Rights Commission 2013



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**Australian
Human Rights
Commission**

April 2013

The Hon. Mark Dreyfus QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to s 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth), I attach my report of an inquiry into the complaint made by BD of discrimination in employment on the basis of criminal record by Queensland (Department of Community Safety).

I have found that the act complained of constitutes discrimination in employment on the basis of the complainant's criminal record.

By letter dated 18 January 2013, the Department of Community Safety provided a response to my recommendations. An extract of its response is set out below:

The Department acknowledges the findings and recommendations made by the President in the Notice dated 20 December 2012. I will address each of the recommendations in turn.

Payment of compensation

The department respectfully maintains its position that it is not responsible for any loss of earnings suffered by [BD] as a result of her resigning from her employment before she had obtained a criminal history waiver...

Review its criminal history waiver guidelines

The department will review all relevant policies and procedures, including the criminal history waiver guidelines, regarding criminal history checks and the criminal history waiver process.

Australian Human Rights Commission

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Provision of information to applicants about the criminal history waiver process

It is anticipated that the provision of information to applicants about the criminal history waiver process will be a matter considered as part of the department's review of all relevant policies and procedures relating to criminal history checks and the criminal history.

Formal written apology

The department will provide a letter of regret to [BD]. In addition to the above, the department will pay [BD]'s legal costs of no more than \$500, subject to [BD] providing evidence of any legal costs incurred as a result of her complaint.

...

I have set out the Department of Community Safety's response in full in section 9 of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the left.

Gillian Triggs
President
Australian Human Rights Commission

1 Introduction

1. This is a report of my inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Australian Human Rights Commission by BD. The complaint is made against the State of Queensland (Department of Community Safety).
2. As a result of my inquiry, I have found that BD was discriminated against on the basis of her criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. I have directed that the complainant's identity be suppressed in accordance with s 14(2) of the AHRC Act. For the purposes of this report, the complainant's name has been suppressed and replaced with the pseudonym BD.

2 Summary

5. On 15 June 2010, BD received a verbal offer of employment to commence work as a Parole Officer with the Department. This offer was conditional upon BD obtaining a criminal history waiver.
6. On 28 September 2010, the Department informed BD that it would not grant her a criminal history waiver on the basis of her criminal record. Accordingly, the Department withdrew its conditional offer of employment.
7. The Department denies that its decision to refuse BD a criminal history waiver constitutes discrimination in employment. The Department submits that its decision was based on the inherent requirements of the job. I accept that trust, honesty and integrity are inherent requirements of the job of Parole Officer.
8. However, I am not satisfied that the Department's decision to refuse BD a criminal history waiver was based on the inherent requirements of the job. In reaching this conclusion, I found the following factors persuasive:
 - That no convictions were recorded for the offences, including the fraud offence, indicating a less serious view of the offences by the Court.
 - A fine of \$300 was imposed for the dangerous drugs offence. No fine or term of imprisonment was imposed for the fraud and receiving property offences, suggesting that the offences were at the minor end of the scale.
 - The offences related to BD's past drug taking behaviour. BD has successfully completed a residential rehabilitation program and remained drug-free for over 10 years. She has not been convicted of any offences since 2000.
 - BD has completed relevant tertiary education and has been in employment since 2007, including a role in which the Department referred offending clients to her for counselling services.
9. I recommend that the Department pay BD a total of \$8 723.65, comprising \$5 723.65 for lost earnings and \$3 000 for hurt, humiliation and distress.

3 Outline of complaint

- 10. On 5 October 2010, BD made a written complaint to the Commission alleging that she suffered discrimination in employment on the basis of her criminal record. She claims that the Department’s refusal to grant her a criminal history waiver and thereby refusal to employ her as a Parole Officer constitutes discrimination within the meaning of s 3 and s 31(b) of the AHRC Act.
- 11. The Department provided a response to BD’s complaint. Both parties have provided further submissions in relation to the complaint. I consider the following statements about the circumstances which have given rise to this complaint to be uncontentious.
- 12. On 15 June 2010, the District Manager of the Bundaberg Probation and Parole Office, Mr David Gordon, made a verbal offer of employment to BD to commence work as a Probation & Parole Assessment Officer (Parole Officer). The job offer was conditional on BD obtaining a ‘criminal history waiver’.
- 13. On the basis of this job offer, BD resigned from her position as ‘Alcohol and Drug Worker’ at Bridges Drug and Alcohol Treatment Service. This role involved counselling offenders referred to her by the Department.
- 14. On 17 August 2010, Mr Gordon completed BD’s criminal history disclosure and consent form on her behalf. Mr Gordon recorded in the disclosure form the offences of possessing dangerous drugs in 1999 and receiving property in 2000. BD signed the disclosure form.
- 15. BD states that at the time she signed the disclosure form, she was not aware that she had also been charged with the offence of fraud in 2000. She states that this is because she destroyed the paperwork relating to her offences. Further, no offences appear on her police certificate because no convictions were recorded.
- 16. On 1 September 2010, the Chief Executive of the Department obtained a copy of BD’s criminal history showing:

Date	Court	Offence	Order
01/07/1999	Bundaberg Magistrates Court	Possessing dangerous drugs	No conviction recorded \$300 fine, 12 days imprisonment in default, 3 months to pay
15/06/2000	Maroochydoore District Court	Receiving property in Queensland Fraud	No conviction recorded Probation 18 months Special conditions

- 17. BD’s application was referred to the Department’s Ethical Standards Unit to consider whether the Department should grant her a criminal history waiver.

18. On 7 September 2010, the Ethical Standards Unit sought submissions from BD regarding 'the offences which occurred in 1999 and 2000'.
19. BD provided information to the Ethical Standards Unit, including that the offences directly related to her past drug taking behaviour. She stated that she had significant issues with heroin abuse at the time and was struggling to reduce her drug use. She stated that she had since undergone rehabilitation and has been living drug-free for over 10 years. She provided information about her education and employment experience since her period of offending. She did not provide specific details about the offences.
20. The Director of the Ethical Standards Unit prepared a memorandum setting out information about BD for the Deputy Commissioner and Commissioner to consider when assessing BD's suitability for employment. The factors included in the memorandum were:
 - That no convictions were recorded against any of the offences.
 - That it had been 10 years since the offences occurred and that BD had been 22 and 23 years old at the time of the offences.
 - That BD's offences related to drug taking behaviour at the time.
 - That her efforts at self-improvement since the offence and genuine and successful rehabilitation efforts had been substantial.
21. The Deputy Commissioner recommended that BD be refused a criminal history waiver and the Commissioner decided not to grant BD a waiver. On 28 September 2010, the Department informed BD of its decision to refuse her a criminal history waiver and advised her that she was 'not eligible for employment within Queensland Corrective Services'.
22. BD requested that the Commissioner re-consider the decision. She provided further details of her personal, professional and academic achievements since the offences and several character references.
23. On 19 October 2010, the Acting Commissioner confirmed the previous decision to refuse BD a criminal history waiver. The Acting Commissioner stated that she had reached this decision
 - having carefully considered your [BD's] submissions and the circumstances of the criminal charges involving offences of possessing dangerous drugs (heroin) and receiving stolen property and fraud.
24. On 21 October, BD telephoned the Executive Support Officer to the Acting Commissioner. BD informed her that she had been arrested for possession of marijuana rather than heroin and that she was not aware of the fraud charge.
25. Later that day, the Executive Support Officer informed BD that the Acting Commissioner acknowledges that the offence of possessing dangerous drugs does not specify heroin. The Department sent BD a revised letter confirming its decision to refuse her a criminal history waiver. This letter was in the same terms as the letter of 19 October except that it did not refer to heroin.
26. BD commenced a new role as a Community Program Coordinator with St Vincent de Paul Society on 15 November 2010.

4 Conciliation

27. The Commission endeavoured without success to resolve the complaint by conciliation.

5 Legal framework

28. Part II, Division 4 of the AHRC Act, which is comprised of s 30 - s 35, is concerned with the Commission's functions relating to equal opportunity in employment.
29. Section 31(b) confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) of the AHRC Act requires that the function of the Commission under s 31(b) be performed by the President.
30. Section 3(1) of the AHRC Act defines discrimination for the purposes of s 31(b) as:
- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this AHRC Act;but does not include any distinction, exclusion or preference:
 - (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.
31. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

6 Issues to be determined

32. It is necessary to consider the following four questions in deciding whether there has been discrimination for the purposes of s 31(b) of the AHRC Act:
- Was there an act within the meaning of s 30(1) of the AHRC Act?
 - Did the act involve a distinction, exclusion or preference on the basis of BD's criminal record?
 - Did that distinction, exclusion or preference have the effect of nullifying or impairing BD's equality of opportunity or treatment in employment?
 - If so, was that distinction, exclusion or preference based on the inherent requirements of the job?

33. I deal with the first three issues briefly below.
34. I consider that the Department's decision to refuse to grant BD a criminal history waiver and thereby refuse to employ BD as a Parole Officer is an act within the meaning of s 30(1) of the AHRC Act.²
35. I also consider that this act involved a distinction, exclusion or preference that was made on the basis of BD's criminal record.
36. In its letter of 28 September 2010, the Acting Director of the Ethical Standards Unit, Craig Rosenthal writes:
- A review of documentation relating to your criminal history information has been conducted and I wish to advise that, in this instance, the department is not prepared to grant you a waiver, therefore you are not eligible for employment within Queensland Corrective Services.
37. It is apparent from this letter that the Department's refusal to employ BD was on the basis of her criminal record. I note further that at the Directions Hearing held by the Commission on 5 October 2011, the Department conceded that BD's criminal record was a basis for its refusal to employ her.
38. I am satisfied that the decision not to employ BD because of her criminal record had the effect of nullifying or impairing her equality of opportunity in employment.
39. Therefore, the central issue in dispute is whether the Department's refusal to employ BD was based on the inherent requirements of the job of a Parole Officer. That is, whether BD's criminal record prevents her from being able to perform the inherent requirements of the job.

7 Was the refusal to employ BD based on the inherent requirements of the job?

40. Section 3(1)(c) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference in respect of a particular job that is based on the inherent requirements of the job'.
41. Section 3(1)(c) is an exception to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.³
42. The AHRC Act was 'introduced to be the vehicle by which Australia's obligations under the [ILO 111 Convention] are implemented.'⁴ For this reason, it is appropriate to construe s 3(1) of the AHRC Act in accordance with the construction given in international law to Article 1 of the ILO 111 Convention.⁵
43. Further, the Governing Body of the International Labour Organisation has created a committee known as the Committee of Experts on the Application of Conventions and Recommendations. It is orthodox to rely upon the expressions of opinion of the Committee for the purposes of interpreting the ILO 111 Convention.⁶

7.1 Identifying the inherent requirements

44. Identification of the inherent requirements of the job is a pre-condition to proving that BD is unable to perform those inherent requirements.

7 Was the refusal to employ BD based on the inherent requirements of the job?

45. An inherent requirement is something that is 'essential to the position'⁷ and not 'peripheral'.⁸ It is an 'essential feature' or 'defining characteristic'.⁹
46. Further, the inherent requirements must be in respect of a particular job. The term 'a particular job' in Article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its inherent requirements those required by the characteristics of the particular job.¹⁰
47. The Department submits that 'trust, honesty and integrity' are inherent requirements of the job of Parole Officer.
48. The Department's role description for a Parole Officer states that the purpose of the role is to:
 - maintain high standards of offender assessment practices and facilitate effective supervision and improved reintegration and rehabilitation of offenders who are subject to community supervision orders.
49. The Department states that the key tasks of a Parole Officer are to 'assess offender risks and needs, prepare written and electronic assessment reports, develop and maintain relationships with key community stakeholder groups, maintain high quality records and contribute to area office operations'. The role description states that success factors for the role include 'Demonstrates Personal Drive and Integrity'.
50. On the basis of the information before me, I am satisfied that trust, honesty and integrity are inherent requirements of the job of Parole Officer.

7.2 Does BD's criminal record prevent her from being able to perform the inherent requirements of the job?

51. The Department's refusal to employ BD must be based on the inherent requirements of the job to fall within the exception to discrimination.
52. The phrase based on requires more than a 'logical link' between the inherent requirements of the job and the exclusion of BD.¹¹ Instead, there must be a 'tight' or 'close' connection between the Department's refusal to employ BD and the inherent requirements of the job of Parole Officer.
53. The decision of the Anti-Discrimination Tribunal in *Wall v Northern Territory Police*,¹² considering the application of legislation prohibiting discrimination on the basis of 'irrelevant criminal record' provides useful guidance on the nature of the relevant assessment. In that case, the Tribunal found that the respondent had not demonstrated a 'tight correlation' between the purported inherent integrity requirement and the complainant's spent criminal record for an offence of theft. The Tribunal commented that it was 'not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics, [such as merit, experience, personal circumstances, references etc]... - not just criminal history (spent or otherwise)'.

(a) The factors relevant to the inherent requirements assessment

54. The following factors are relevant to an assessment of whether BD could perform the inherent requirements of the job.¹³

(i) Nature of criminal record including any custodial sentence

55. BD's criminal record shows one offence in 1999 and two offences in 2000. When she was 22 years old, BD was charged with the offence of possessing dangerous drugs and fined \$300. When she was 23 years old, BD was charged with the offences of receiving property and fraud. She was placed on probation with special conditions for these offences.
56. The Department notes that BD's offences in 2000 were dealt with in the District Court and not in the summary jurisdiction of the Magistrate's Court. However, no custodial sentence was imposed for any of these offences. Importantly, no convictions were recorded for any of these offences, indicating a less serious view of the offences by the courts.

(ii) Circumstances surrounding offending

57. In BD's submissions to the Ethical Standards Board, she stated that she had significant issues with heroin abuse and was struggling to reduce her drug use at the time the offences occurred. She states that she was charged with the offence of possessing dangerous drugs when she was found with marijuana in her possession.
58. At the Directions Hearing held by the Commission on 5 October 2011, BD explained that the circumstances surrounding her receiving property and fraud offences involved her selling property to a Pawn Broker so that she could support her drug taking behaviour. I note that the court attached to the order for these offences the special condition that BD 'undergo such medical, psychological and/or other treatment and/or counselling, as directed'. This indicates that in the court's view there was a strong link between the fraud and receiving property offences and her drug taking behaviour at the time.

(iii) Time since convictions

59. BD has not been convicted of any offences since 2000. Approximately 10 years passed between the time of her last offence and the Department's refusal to employ her.

(iv) Conduct since period of offending

60. It is apparent from BD's submissions to the Ethical Standards Board that her lifestyle is considerably different to the lifestyle she was living at the time the offences occurred. She successfully completed a long term residential rehabilitation program in 2000 and has remained drug free ever since. She has since become a mother to two children, bought a home and is now living close to extended family and professional support.
61. In 2003, BD completed a Bachelor of Teaching. In 2007, she completed a Bachelor of Social Science (Community Work) and a Diploma of Alcohol and Other Drugs Work. BD has been employed in various positions since 2007. In fact, BD's most recent employment as an Alcohol and Drugs Worker involved working with offenders and presenting educational sessions at the Maryborough Correctional Centre.

(b) The Department's submissions

62. The Department submits that there were two grounds for its decision to refuse to employ BD, namely: i. the nature of the offences; and ii. BD's failure to disclose her conviction of fraud.

63. However, the Department states that it accepts that BD was not aware of her charge of fraud at the time she completed her application for a criminal history waiver. It concedes that it would have 'refused her a criminal history waiver even if she had disclosed her complete criminal history'. There is therefore no need for me to consider BD's failure to disclose the offence of fraud for present purposes.
64. The Department submits that 'the nature of the offences in BD's criminal history demonstrate that she is unsuitable for employment in the position she applied for'. It states:
- notwithstanding the passage of time and BD's explanation of her personal circumstances at the time of the offending, drug possession and/or use, receiving stolen property and fraud are offences of a serious nature.
65. It states that two of the offences involve elements of dishonesty. Further, it considers 'the offence of fraud as being the most serious of the offences committed (by BD) because it is an offence which goes to a person's trustworthiness, integrity and honesty'.
66. I also note that the memorandum recording the Commissioner's decision states that BD's failure to disclose the circumstances surrounding her offending during the application process was relevant to the decision. I note that BD's submissions to the Ethical Standards Board were open and honest about her personal circumstances. She indicated that she was engaged in drug taking behaviour at the time. At the Directions Hearing, BD provided details of the circumstances of the particular offences of receiving property and fraud. She explained that these offences involved her selling property to a Pawn Broker to support her drug taking behaviour. I have formed the view that any gaps in BD's disclosure at the time of her application were a result of her failure to understand the particular information sought rather than any lack of candour on her part.

(c) Conclusion

67. After carefully considering all of the material before me, I have arrived at a different view from that of the Department. I accept that BD's criminal record is relevant to an assessment of whether she could perform the inherent requirements of the job. However, I do not accept that a person with BD's criminal history is necessarily rendered incapable forever of fulfilling the inherent requirements of trust, honesty and integrity.
68. I note that no convictions were recorded for the offences, including the fraud offence, indicating a less serious view of the offences by the court. BD was fined \$300 for the possessing dangerous drugs offence. No fine or term of imprisonment was imposed for the fraud and receiving property offences. This suggests that the offences were at the minor end of the scale.
69. BD has successfully completed a residential rehabilitation program and remained drug-free for over 10 years. She has not been convicted of any offences since 2000.
70. Further, she has completed relevant tertiary education, and has been in employment since 2007, including a role in which the Department referred offending clients to her for counselling services. There has been no suggestion that she was anything but trustworthy and honest in this or other roles. I note that Mr Gordon, District Manager of the Bundaberg Probation and Parole Office, knew of her criminal history at the time he offered her employment.
71. In my view, the fact that the circumstances that led to BD's offending no longer exist, the steps she has taken to overcome her drug addiction and become an effective member of the community, and the length of the period of not offending are highly persuasive factors.
72. I conclude that the Department has not demonstrated a sufficiently tight and close connection between the inherent requirements of trust, honesty and integrity and its refusal to employ BD.

73. For the reasons set out above, I find that the Department's refusal to employ BD constitutes 'discrimination' on the basis of criminal record.

8 Power to make recommendations

74. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination; the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁵
75. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.¹⁶
76. On 9 August 2012, BD provided submissions regarding possible recommendations. On 15 August 2012, she provided further details of her claimed economic loss.
77. On 28 August 2012, the Department confirmed that it wished to rely on its submissions dated 26 July 2012 regarding possible recommendations.

8.1 Compensation

78. I am of the view that compensation should be paid to BD for loss and damage suffered. I consider that compensation in the sum of \$8 723.65 is appropriate in all the circumstances. In assessing the sum recommended, I have taken into account the matters discussed below.
79. The Federal Court has indicated that tort principles for the assessment of damages in cases of this type should be applied.¹⁷ I am of the view that this is the appropriate approach to take in the present matter. For this reason, so far as is possible by a payment of compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.¹⁸
80. It is apparent from the material before me that BD resigned from her role at Bridges Aligned Services on 27 August 2010 on the basis of the Department's conditional offer of employment. On 28 September 2010, the Department informed BD of its refusal to grant her a criminal history waiver and its withdrawal of its offer of employment. After pursuing an internal review of the Department's decision, BD took active steps to seek alternative employment and commenced a new role on 15 November 2010 with St Vincent de Paul.

(a) Mitigation of loss

81. The Department submits that 'it is a well-established principle that a person claiming compensation or damages must mitigate their losses' and that 'it should not be held liable for any financial loss caused to BD because of the loss of her previous employment'. It submits that it was not reasonable for BD to resign from her previous employment based on a job offer that was conditional on her obtaining a criminal history waiver. It submits that this is particularly the case where she should have been aware that her criminal record was relevant to the Department's decision to grant or refuse her a criminal history waiver.

82. In response, BD states that she could see no reason why she would not receive a criminal history waiver. First, she says her offences occurred over 10 years ago and that she considered them minor. She notes she was only aware of her drug possession and receiving property charges at the time she resigned from her previous employment. Second, the Department had previously granted her a criminal history waiver, albeit for a different purpose. Third, she states that Mr Gordon had told her 'not to worry about it [her criminal history waiver]' and that 'it would only take a few weeks'. Finally, she had seen information on the Department's website stating that 'a criminal conviction or charge does not automatically exclude an applicant from consideration for appointment with QCS'.
83. The principle of mitigation under the general law of damages is that a person must take all reasonable steps to mitigate the loss consequent on a breach of contract or in tort, and debars the claimant from claiming any part of the damage, which is due to his or her neglect to take such steps.¹⁹ The standard of reasonableness under the ordinary principles of mitigation is not high.²⁰ The principle of mitigation applies only *after* the respondent has committed a breach of contract or committed a tort and to the losses *consequent upon* the respondent's wrong.²¹ In my view, there is no reason to depart from this view when determining the amount of compensation that is payable under the AHRC Act. In the present circumstances, the principle of mitigation of loss would only apply from the date the Department informed BD that it was refusing to grant her a criminal history waiver. There is no duty on BD to take steps to mitigate in anticipation of an act of discrimination occurring. To find otherwise would undermine the policy underpinning Part II Division 4 of the AHRC Act.
84. Generally, the correct approach to the assessment of damages is to compare the position BD might have been in had the discriminatory conduct not taken place with the situation in which she was placed by reason of the conduct of the Department.²² Had the Department granted BD a criminal history waiver, BD would have commenced work and been paid the salary offered by the Department. The 'natural and reasonable result'²³ of the Department's conduct was that BD did not commence employment with the Department and was not able to earn this income. The loss suffered by BD was the 'immediate result'²⁴ of the Department's conduct in failing to grant the criminal history waiver.
85. For the sake of completeness, I also consider that in the period immediately following the Department's failure to grant her a criminal history waiver, BD acted reasonably and mitigated her loss by first seeking to have the Department's decision reviewed and then seeking alternative employment. I note that BD found alternative work relatively quickly. I therefore reject the Department's submission that BD failed to mitigate her losses and that it is not liable for any of her losses.

(b) Loss of earnings

86. BD claims compensation for a sum of \$9 062. This sum represents the pay she would have received from the Department (had it granted her a criminal history waiver) from the date the Department refused her a criminal history waiver until the date she commenced her new role. I note that BD does not make any claim for future economic loss arising from the Department's conduct.
87. In my view, it is reasonably likely that BD would have commenced working for the Department on or about Monday 4 October 2010 had the Department granted BD a criminal history waiver sometime on or around 28 September 2010. There was therefore approximately 6 weeks between the time BD could have started the role with the Department and the date she commenced her new role.

88. BD has provided me with a role description for a 'Probation and Parole Officer (Assessment)' with the Department. The classification for this role is PO3 (\$67 321 - \$73 520 per annum) based on a 38 hour week. The Department states that it 'offered BD a temporary, part-time position'. BD had been working 28 hours per week in her previous role at Bridges. I therefore estimate that had BD commenced working for the Department in a part-time role, working 28 hours per week, she would have received a gross pro rata annual salary of \$49 604.95. Accordingly, I calculate BD's loss of earnings over a 6-week period to be \$5 723.65.

(c) Hurt humiliation and distress

89. Compensation for BD's hurt, humiliation and distress would, in tort law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.²⁵
90. BD has claimed \$7 000 for hurt, humiliation and distress.
91. I am satisfied that BD suffered hurt, humiliation and distress as a result of being discriminated against on the basis of her criminal record. I note that while BD found alternative employment relatively quickly, she has not been able to secure employment in her desired occupation as a Parole Officer.
92. I therefore consider a relatively modest award of monetary compensation for hurt, humiliation and distress in the amount of \$3 000 is appropriate.

8.2 Policy

93. I recommend that the Department:
- review its criminal history waiver guidelines and policies in light of these recommendations; and
 - ensure all applicants are provided with accurate information about the kind of assessment the Department undertakes when deciding whether to grant or refuse a criminal history waiver.

8.3 Apology

94. Finally, I consider that it is appropriate that the Department provide a formal written apology to BD. Apologies are important remedies for breaches of discrimination. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁶

9 Response to recommendations

95. By letter dated 20 December 2012, the Commission requested that the Department advise whether it has taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.
96. By letter dated 18 January 2013, the Department provided the following response to my recommendations:

The Department acknowledges the findings and recommendations made by the President in the Notice dated 20 December 2012. I will address each of the recommendations in turn.

Payment of compensation

The department respectfully maintains its position that it is not responsible for any loss of earnings suffered by [BD] as a result of her resigning from her employment before she had obtained a criminal history waiver. The offer of employment made to [BD] was subject to her obtaining a criminal history waiver. [BD] was aware at the relevant time that she required a criminal history waiver and that she had a criminal history. The department remains of the view that [BD] accepted the risk of any loss of earnings incurred as a result of her resigning from her employment before she had obtained a criminal history waiver allowing her to be employed by the department.

Review its criminal history waiver guidelines

The department will review all relevant policies and procedures, including the criminal history waiver guidelines, regarding criminal history checks and the criminal history waiver process.

Provision of information to applicants about the criminal history waiver process

It is anticipated that the provision of information to applicants about the criminal history waiver process will be a matter considered as part of the department's review of all relevant policies and procedures relating to criminal history checks and the criminal history.

Formal written apology

The department will provide a letter of regret to [BD] in the following terms:

Dear [BD]

I refer to your Complaint lodged with the Australian Human Rights Commission on 5 October 2010 claiming discrimination in employment on the basis of your criminal record. I am aware of the circumstances of your complaint and that you were dissatisfied with the department's refusal to grant you a criminal history waiver.

The Department sincerely regrets that the issues raised in the Complaint may have caused you distress.

Yours sincerely

Marlene Morrison
Commissioner
Queensland Corrective Services

In addition to the above, the department will pay [BD]'s legal costs of no more than \$500, subject to [BD] providing evidence of any legal costs incurred as a result of her complaint.

97. I report accordingly to the Attorney General.



Gillian Triggs
President
Australian Human Rights Commission

April 2013

- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
- 2 Section 3(3) of the AHRC Act defines an 'act' to include a refusal to do an act.
- 3 *X v Commonwealth* (1999) 200 CLR 177, 222-223, [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333, [152.4] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, [89] (Wilcox J).
- 4 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 [35] (Black CJ).
- 5 *Commonwealth v Hamilton* (2000) 108 FCR 378, 385 [31] and following.
- 6 *Ibid* [36].
- 7 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
- 8 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
- 9 *Ibid* [42] (McHugh J).
- 10 International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHughJ).
- 11 See: *Mr KL v State of NSW (Department of Education)* [2010] AusHRC 42. See further: *Commonwealth v Bradley (Bradley)* (1999) 95 FCR 218, *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482. [2005] Northern Territory Anti-Discrimination Commission (Unreported, Commissioner Fitzgerald, 22 April 2005).
- 12 The Chief Executive is obliged to consider similar matters under s 336 of the *Corrective Services Act 2006* and the Department's Guidelines for Assessing Suitability – Relevant Persons, dated 28 August 2006.
- 14 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
- 15 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
- 16 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
- 17 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J) [55].
- 18 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 19 *British Westinghouse Co v Underground Ry* [1912] A.C. 673, 689 (Viscount Haldane L.C.). See generally: McGregor, H, *Mcgregor on Damages*, (18th ed, 2010), Chapter 7.
- 20 See for example: *Banco de Portugal v Waterlow* [1932] AC 452, 506 (Lord MacMillon). See also: McGregor, H, *Mcgregor on Damages*, (18th ed, 2010), Chapter 7, 7-070.
- 21 *Belous v Willetts* [1970] VR 45. See also: *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038 (Diplock J) and *Whitaker v Unisys Australian Pty Ltd* (2010) 26 VR 668, [166] (Ross J). See: McGregor, H, *Mcgregor on Damages*, (18th ed, 2010), Chapter 7, 7-004, 7-020.
- 22 *Hall v Sheiban* (1989) 20 FCR 217, 239 (Lockhart J).
- 23 *Allan v Barclay* (1864) 2 M 873, 874, *M'Kew v Holland & Hannen & Cubitts (Scotland) Ltd* [1970] SC (HL) 20.
- 24 C.f. *M'Kew v Holland & Hannen & Cubitts (Scotland) Ltd* [1970] SC (HL) 20, cited in *Chappel v Hart* (1998) 195 CLR 232, 271 (Kirby J).
- 25 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
- 26 D Shelton, *Remedies in International Human Rights Law* (2000), 151.

Further Information

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