

LEGAL FORUM

DISCRIMINATION IN FOCUS

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Introduction

In the first two or three decades after the Second World War there was a considerable movement internationally to address issues relating to the well being of people in the work force. Part of this overall thrust saw the development in many countries of comprehensive health and safety legislation of the type that New Zealand has just introduced.¹

Another thrust of this general "social justice" trend was a new emphasis on outlawing certain types of discrimination. This stemmed from the 1948 Universal Declaration of Human Rights² and resulted in a number of international conventions, for example the International Convention on the Elimination of All Forms of Racial Discrimination,³ and the United Nations Declaration on the Elimination of Discrimination against Women.⁴ It also resulted in the introduction of "discrimination legislation" in many countries.

This international trend finally reached New Zealand in the 1970s, resulting in the enactment of the Race Relations Act 1971, the Equal Pay Act 1972 and the Human Rights Commission Act 1977.⁵

In recent years the subjects of discrimination and sexual harassment have attracted increasing public attention. Perhaps the most high profile case was the October 1991 "trial" of US Supreme Court Nominee, Clarence Thomas as a result of the allegations made by Professor Anita Hill that Thomas had discussed with her details of pornographic films and his own sexual prowess. In the light of this public discussion it is appropriate to consider the current state of New Zealand law on discrimination, particularly in the employment setting.

It is important to note that the common law never developed any protection against discrimination in the workplace, or in any other area of human activity. The only protections against discrimination are those laid down by statute, and these are not limited to the

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¹ Health and Safety in Employment Act 1992

² Adopted by the United Nations in 1948

³ Adopted by the UN in 1965, and ratified by NZ in 1972

⁴ Adopted and proclaimed by the UN in 1967

⁵ The three principal anti-discrimination statutes were briefly augmented by the Employment Equity Act 1990. However this was repealed later the same year.

employment relationship, but also cover such matters as the provision of goods and services, accommodation, advertising, and access to public places.

New Zealand's present anti-discrimination law is contained in the Employment Contracts Act 1991, and the Race Relations Act 1971 and the Human Rights Commission Act 1977.⁶ These three statutes are largely overlapping and the Courts have adopted a uniform approach to them. It is convenient therefore to consider in detail the Employment Contracts Act provisions on discrimination and sexual harassment since this Act contains the most recent legislative enshrinement of the common ideals, and then briefly consider the important differences in the other two statutes and future developments which may occur.

Employment Contracts Act provisions on discrimination

The law does not prohibit discrimination at large, or discrimination in the popular sense. It is only specific types of behaviour in specific situations which are expressly prohibited. Therefore, in order to understand the New Zealand law on discrimination it is necessary to consider the statutory provisions in some detail.

Pursuant to s27(1)(c) of the Employment Contracts Act 1991, an employee may have a personal grievance where an employee has been "discriminated against". That term is defined in s28 of the Act:

" ... an employee is discriminated against ... if the employee's employer or a representative of that employer -

- (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- (b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment-

by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief and/or age of that employee or by reason of that employee's involvement in the activities of an employees organisation".

The definition has two operative components. For discrimination to occur the employer must:

- (a) make a decision in one of five broad areas, namely:
 - (i) recruitment;
 - (ii) offering terms and benefits;
 - (iii) promotion and transfer;
 - (iv) training;
 - (v) dismissal or detriment; and
- (b) that decision must be influenced by a consideration of one of six factors,

⁶ There is also the Equal Pay Act 1972, which abolished gender based wage differentials in industrial awards but this is of less practical significance now and accordingly is not considered further.

namely:

- (i) colour, race, ethnic or national origin
- (ii) sex
- (iii) marital status
- (iv) religious or ethical beliefs
- (v) employee organisation involvement
- (vi) age

Each of these six factors warrants separate consideration.

Colour, race, ethnic or national origins

The leading case in this area is *Human Rights Commission v McCarthy*.⁷ The decision arose as a result of a complaint under the Race Relations Act, when employees of a clutch repair garage made particularly derogatory and racially offensive comments to a Samoan customer. The Human Rights Commission successfully brought an action against the employees, the managing director and the company.

Less extreme conduct may also amount to discrimination on grounds of race. The Human Rights Commission have, for example, indicated that discrimination may arise where cultural styles of dress which do not conform to the "corporate image" are considered inappropriate.⁸

Sex

This ground of discrimination has given rise to some of the most widely publicised cases, and particularly *Human Rights Commission v Air New Zealand*⁹ and *Barry v NZ Fire Commission*.¹⁰

The Equal Opportunities Tribunal decision in *Human Rights Commission v Air New Zealand* was the first opportunity the Tribunal had to invoke the procedures of the Human Rights Commission Act. In the landmark decision in December 1988, the Tribunal found that sex discrimination had occurred in the treatment of female cabin crew compared to male cabin crew, and the ability of females to obtain the same promotion and career path as their male colleagues. The Tribunal found that the 17 female complainants had endured behaviour and incidents which ranged from indifference to extreme harassment of a sexist and at times racist nature and awarded damages for loss of salary, opportunity, annual leave and damages for humiliation and loss of dignity.

While the individual payouts to the women and the total amount of the settlement remained confidential, the company did agree to meet the costs of the Human Rights Commission in taking the case to the Tribunal. These amounted to

⁷ (1983) 3 NZAR 450

⁸ Equal Opportunities Manual, Human Rights Commission 1989, p.31

⁹ (1989) 2 NZELC 96,614

¹⁰ Human Rights Commission, 28 January 1982

\$303,858.00.

In the same year, 1981, the case of *Barry v NZ Fire Commission* arose. Mrs Barry applied to join the Fire Service and was turned down on the grounds that she was below the minimum height requirement. The Human Rights Commission found that there was no minimum height required, and that she had in fact been rejected because of the all male tradition of the service. Mrs Barry was subsequently appointed to fire fighting duties.

Marital status

A recent illustration of discrimination on this grounds is provided by *Proceedings Commissioner v NZ Post Ltd*¹¹. NZ Post Ltd had a voluntary severance scheme which provided for a payment related to wages, together with a smaller percentage payment for the employee's spouse and for each dependent child. An employee who was not married, and therefore did not receive the additional payment which married employees received, challenged the legality of the arrangement and it was held that it did amount to discrimination on the grounds of marital status since the complainant did not get the additional payment precisely because of his marital status, i.e., the fact that he was not married.

Religious or ethical belief

The leading case on discrimination on these grounds is *Human Rights Commission v Eric Sides Motors*¹² where a Christian employer sought a Christian employee. As a result of the decision the Human Rights Commission Act was amended by the inclusion of s15(7A) allowing for preferential treatment based on religious belief in certain special circumstances.

Union (employee organisation) involvement

An illustration is provided by *Post Office Union v Telecom*¹³ where it was alleged that a union member who was not promoted because his "loyalty was suspect and he would require extensive training before he could take up the duties" was discriminated against because of his union involvement. However the union failed to discharge the burden of proof as it could not establish that on the balance of probabilities it was the employee's union involvement that caused the employer not to promote him.

Age

This ground of discrimination has been the subject of much public attention, and is currently making up 44% of all enquiries and informal complaints to the Commission.¹⁴ The recent suggestion by the Commission that advertising for a "senior lecturer" amounts to discrimination on the basis of age has been the subject

¹¹ (1992) NZAR 111

¹² (1981) 2 NZAR 447

¹³ (1990) 3 NZELC 97,511

¹⁴ Human Rights Commission Newsletter September 1992 p.2

of much controversy.¹⁵ The Commission has also indicated¹⁶ that they consider the following to be discriminatory:

"driver: must have at least five years experience"

"school leavers required"

"mature and experienced senior sales person"

"wanted, youthful and energetic person".

The first case under the new law has recently arisen. A public sector employer required two 60 year old employees to retire, purely because they had turned 60. In a settlement mediated by the Human Rights Commission the employees received compensation totalling \$26,500.00.¹⁷

Applicable legal principles

From the discrimination cases over the last decade or so a number of general principles have emerged illustrating the approach taken by the Courts in discrimination cases. They are:

The substantial or operative factor test

In order for a person to be discriminated against on grounds of, for example, race, the employee must only prove that race was a "substantial or operative factor" in the making of the decision.

This test was laid down in the decision of *Human Rights Commission v Eric Sides Motors*.¹⁸ The defendant, a service station, advertised for a "keen Christian" to work in the garage. A young man answered the advertisement and during a telephone conversation was asked whether he went to church on Sundays. The applicant indicated that he did not, and was told by the proprietor that it was no use coming for an interview.

The case took a rather unusual twist insofar as the defendant proprietor staunchly and vigorously maintained that he had a right to employ only "keen Christians", and that if he was faced with a choice between two applicants, one of whom was a Christian and one of whom was not he would always choose the Christian. However he maintained that on this particular occasion he made the decision not to employ the applicant because earlier in the conversation he had ascertained that the applicant had had a large number of jobs in relatively quick succession, and therefore appeared to be a highly unreliable and unsatisfactory employee.

On the evidence before it, the Court found that it was not proved that the applicant's failure to attend church was an operative factor, and therefore it was held that this particular

¹⁵ see, for example, "Senior Hits a Nerve" NZ Herald 12 December 1992

¹⁶ Human Rights Commission publication "Age Discrimination in Employment - Guidelines for Advertisers"

¹⁷ reported in "Women Win Compo For Age Bias" NZ Herald 2 November 1992

¹⁸ (1981) 2 NZAR 447

element of discrimination had not been proved. However the important point of principle to emerge from the case was the establishment of the "substantial or operative factor" test.

The characteristic need not be the only factor

Although the grounds on which discrimination is alleged must be "a substantial or operative factor" it does not have to be the only factor. It is sufficient if it is a factor in the decision, regardless of whether there were other considerations as well. This is illustrated by what has become known as the "gender plus" test from sexual discrimination cases.

Situations have arisen where an employer has made sexual advances to an employee, and when those advances have been rebuffed the employee has been dismissed. Employees have challenged such terminations and the defence has been mounted that the employee was not discriminated against because of their gender per se, but rather because they were attractive.

This defence has been tried in a number of countries, and in New Zealand the leading decision is *H v E*¹⁹. The judgement in that case included a substantial review of US,²⁰ Canadian,²¹ Australian²² and British²³ law on this area, all of which adopts the same approach. The Court decided that New Zealand law should follow the overseas authorities, and where the basis for the decision was the gender of the employee plus some other factor there could still be discrimination on grounds of sex. In other words the employer's conduct was still discrimination on the grounds of sex despite the fact that he would not have treated all female employees the same way; the employee had to be female and sexually attractive to the employer.

Discrimination may be direct or indirect

Discrimination may be either direct or indirect, although of course, major evidentiary difficulties arise in respect of indirect discrimination. This issue most frequently arises in respect of recruitment situations. It is unlawful, and a personal grievance may arise, where an employer advertises a position or selects applicants for a position on the basis of some factor which has the effect of discriminating on one of the grounds prohibited even though it does not expressly do this.

Situations where this might arise include, for example, imposing a minimum height requirement on employees, where there is no real requirement for this. This has the obvious effect of indirectly discriminating against women who tend on average to be shorter.

¹⁹ (1985) 5 NZAR 333

²⁰ for example, *Bundy v Jackson* [24 EDP 31,4391]

²¹ for example, *Giouvanoudis v Golden Fleece Restaurant & Anor* 5 Canadian Human Rights Reporter Decision No.339

²² for example, *O'Callaghan v Loder & Anor* (1984) EOC 92,023

²³ for example, *Hurley v Mustoe* [1981] I RLR 4

However, where a particular skill is a requirement of the job, the inclusion of that factor in the selection criteria may not be indirect discrimination. For example, a firm which has a large Chinese client base may require fluency in Mandarin from its employees even though this may discriminate in favour of Chinese employees. Obviously, however, there are no general tests in this area and each case will depend on its own facts.

Inconvenience is no defence

It is not a defence for an employer to say that the rest of the work force would not accept an employee of a particular gender or race.

In *Human Rights Commission v Ocean Beach Freezing Co Ltd*²⁴ the Union and the males on the killing chain threatened to walk out and cause widespread industrial disruption if any females were given jobs on the killing chain. When the matter was challenged it was found that the women had been unlawfully discriminated against and the employer was ordered to pay damages to the women.

Sexual harassment

By the employer

Like discrimination, sexual harassment has a specific statutory definition in respect of employment law. Any particular fact situation may also involve the commission of other crimes or torts, where the elements required may be different. However, sexual harassment by an employer as defined in the Employment Contracts Act²⁵ is:

"... an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer-

- (a) Makes a request for sexual intercourse, sexual contact, or other form of sexual activity which contains-
 - (i) An implied or overt promise of preferential treatment in that employee's employment; or
 - (ii) An implied or overt threat of detrimental treatment in that employee's employment; or
 - (iii) An implied or overt threat about the present or future employment status of that employee; or
- (b) By-
 - (i) The use of words (whether written or spoken) of a sexual nature; or
 - (ii) Physical behaviour of a sexual nature, - subjects the employee to behaviour which is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and which is either repeated or of such a significant nature that it has a detrimental effect on that employee's employment, job performance, or job satisfaction. (emphasis added)

²⁴ (1981) 2 NZAR 451

²⁵ s29

The essential concern is with abuse of power rather than sex per se, the heart of the definition being that sexual harassment occurs where an employer or a representative of the employer makes a request for some form of sexual activity which is linked with some promise or threat.

The request can be by words, or by physical behaviour which is:

- (i) unwelcome or offensive; and
- (ii) either repeated or so significant that it has a detrimental effect on the employee's employment, job performance or job satisfaction.

By co-workers or customers

A second limb of sexual harassment is defined in section 36 and deals with harassment by fellow employees or customers or clients.

- "(1) Where-
 - (a) A request of the kind described in section 29(1)(a) of this Act is made to an employee; or
 - (b) An employee is subjected to behaviour of the kind described in Section 29(1)(b) of this Act-by a person ... who is in the employ ... or who is a customer or client of the ... employer, the employee may make a complaint in writing ...
- (2) The employer or representative, on receiving a complaint ...
 - (a) Shall inquire into the facts; and
 - (b) If satisfied that such a request was made or that such behaviour took place- shall take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.
- (3) Where any person, being a person in relation to whom an employee has made a complaint under subsection (1) of this section-
 - (a) Either-
 - (i) Makes to that employee after the complaint a request of the kind described in Section 29(1)(a) of this Act; or
 - (ii) Subjects that employee after the complaint to behaviour of the kind described in section 29(1)(b) of this Act; and
 - (b) The employer of that employee or a representative of that employer has not taken whatever steps are practicable to prevent the repetition of such a request or such behaviour-that employee shall be deemed for the purposes of this Act and for the purposes of any employment contract to have a personal grievance by virtue of having been sexually harassed ..."

The distinguishing feature is that in such circumstances there is no necessity for there to be an implied promise or threat. There need only be a request for some form of sexual activity or conduct which is unwelcome or offensive and repeated or detrimental to the employee's employment, job performance, or job satisfaction. However a personal grievance will not arise immediately, but only if the employee makes a written complaint, the conduct occurs again and the employer has not taken all practicable steps to prevent the repetition.

Sexual harassment can include a vast range of activities, ranging from rape through to persistent sexual jokes or innuendo. One of the difficulties with this area is that perceptions of what is "fun" or "acceptable" and what is "harassment" vary so widely. This

is illustrated by a recent Time/CNN survey.²⁶

Do you think sexual harassment occurs when a man who is a woman's boss or supervisor:	
	Yes
Flirts with the woman	41%
Makes remarks to her that contain sexual references or double meanings	80%
Frequently puts his arm around her shoulders or back	64%
Insists on telling sexual jokes to her	74%
Insists on discussing pornographic acts with her	91%
Pressures her to go out to dinner with him	77%
Asks her to have sex with him	87%

The Human Rights Commission has provided a list of examples of sexual harassment²⁷ which includes:

- personally offensive verbal comments;
- sexual or smutty jokes;
- repeated comments or teasing about a person's alleged sexual activities or private life;
- persistent, unwelcome social invitations or telephone calls from workmates at work or at home;
- being followed home from work;
- offensive hand or body gestures;
- physical contact such as patting, pinching, touching or putting an arm around another person's body at work;
- provocative posters with a sexual connotation;
- sexual assault and rape.

A recent illustration is provided by *Fulton v Chiat Day Mojo Ltd.*²⁸ The applicant was employed by the respondent as a receptionist. When she was employed she was warned about the "off beat" nature of the workplace sense of humour. During the course of her employment she was induced to page non-existent people with names which amounted to

²⁶ Time "Office Crimes" 21 October 1992 p.30

²⁷ *Sexual Harassment in the Workplace* Human Rights Commission 1991 p.6

²⁸ [1992] 2 ERNZ 38

"phonetic obscenities". She complained to her employer about this sexual harassment. The offending staff were spoken to about the behaviour and she was reassured that it would not be repeated.

Soon afterwards the applicant was given a letter by her employer stating some concerns about her work performance. She noted that the sexual harassment had an effect on her work, and her employer suggested that she was over reacting to a joke. She was asked why she continued with the job, and the following day she resigned.

The Employment Tribunal at Auckland held that the words complained of constituted sexual harassment as they were of a sexual nature, unwelcome and offensive and were detrimental to her work. However, as the employer had taken all practicable steps to prevent the reoccurrence of such harassment the applicant had no personal grievance against the employer.

It was held, however, that the applicant was constructively dismissed since the respondent made it plain that the jokes were amusing and remained amusing. By condoning the offensive behaviour, even after taking steps to prevent its reoccurrence, the respondent effectively told the applicant that she ought to accept such behaviour, and in such circumstances her resignation amounted to a constructive dismissal.

Employer's obligation of fairness

The employer is, in many respects, in a "double jeopardy" situation in respect of allegations of sexual misconduct. Not only must the employer be fair to the employee allegedly being harassed, but must also be fair to the employee allegedly harassing.

In *B v NZ Amalgamated Engineering Union*²⁹ an employer dismissed an employee for misconduct following complaints of sexual harassment by two of his female work colleagues. The incident complained of was an exchange of words between the complainant and Mr B, followed by Mr B taking hold of the complainant around her shoulders, pulling her towards him and attempting to kiss her, or actually kissing her (the facts were in dispute). The words complained of were to the effect that Mr B had seen the complainant with another employee walking arm in arm and flirting madly.

Mr B was put on notice of instant dismissal if the allegations were established. The employer undertook an investigation and concluded that the words used were of a sexual nature, and the physical conduct was both unwelcome and offensive and that such conduct amounted to sexual harassment. Mr B was accordingly dismissed.

The employee challenged his dismissal and the Employment Tribunal at Auckland held that the conduct complained of did not amount to sexual harassment within the meaning of the Act. The conduct was offensive and contained a sexual dimension and may even have constituted indecent assault, but the Tribunal found that it had not been established that the conduct was of such a degree as to have a detrimental affect on the employee's employment.

The dismissal was found to be both substantively and procedurally unfair. The Court further noted that even if the conduct complained of had amounted to sexual harassment, dismissal would have been an inappropriate form of discipline. This was because there were other options such as a final warning, counselling or opportunity to apologise and some or all of these would have been more appropriate.

²⁹ [1992] 2 ERNZ 554

Human Rights Commission Act and Race Relations Act

The statutory provisions concerning discrimination in the Human Rights Commission Act and Race Relations Act contain essentially the same provisions as those in the Employment Contracts Act. The Acts focus on decisions made in respect of recruitment, terms and benefits of employment, promotion and transfer, training and dismissal. The combined effect of the two Acts is that the employer may not discriminate on grounds of colour, race, ethnic or national origins, sex, marital status, religious or ethical belief or age.

There are certain limited exceptions for practical purposes, such as where it is a genuine requirement of a job that a person be of a particular sex.³⁰

There are also certain exceptions in the Human Rights Commission Act which allow "positive discrimination" in circumstances where the discrimination is undertaken in good faith for the purpose of assisting or advancing persons of a particular group where that group may reasonably be supposed to need assistance or advancement in order to achieve an equal place in the community.³¹ It should be noted that these provisions do not avail an employee who wishes merely to maintain a particular gender balance within a team.³²

The principal difference between the Employment Contracts Act provisions and the Human Rights and Race Relations Act provisions is in the area of procedure and remedies.

Procedure and remedies

Pursuant to the Employment Contracts Act an employee alleging discrimination or sexual harassment has access to the personal grievance proceedings, and the remedies provided in the Act.

The only difference from ordinary personal grievance remedies is that in cases of sexual harassment there is an additional remedy available. The Tribunal or Court is entitled to make recommendations to the employer concerning the action the employer should take in respect of the person who was guilty of the harassment.³³

There is also an express provision that in cases of sexual harassment no account shall be taken of any evidence of the employee's sexual experience or reputation.³⁴

Under the Human Rights Commission Act and Race Relations Act the appropriate procedure is to refer the matter to the Human Rights Commission or Race Relations Conciliator who may investigate the matter with a view to seeking a settlement through conciliation. If there is no settlement the matter may be referred to the Equal Opportunities Tribunal which has similar remedial powers to the Employment Tribunal. The most

³⁰ see, for example, s.15(3) Human Rights Commission Act 1977

³¹ s29 Human Rights Commission Act 1977

³² *Parr v Broadcasting Corporation of NZ* (1987) 1 NZELC 95,560

³³ s40(1)(d) Employment Contracts Act

³⁴ s36 Employment Contracts Act 1991

significant difference however is that reinstatement is not available as a remedy.

An employee must elect which procedure to use, and cannot proceed both under the Employment Contracts Act and under the Human Rights Commission or Race Relations Act.

Future developments

Over two years ago a Bill was introduced to Parliament to amend the Human Rights Commission Act to extend the grounds on which discrimination would be unlawful to include age, health status, sexual orientation, pregnancy, political opinion, unemployment status, beneficiary status, family status, and the identity of a partner or relative.

The age discrimination provisions were part of this Bill, but were fast tracked and became law earlier this year.³⁵ The other provisions are only now being revisited and at the present time are the subject of Parliamentary and public debate.

The legal principles which guide the Courts in the area of discrimination are relatively well settled and if any of the proposed new grounds of unlawful discrimination are adopted it can be expected that the extension of existing principles to cover the new grounds will cause little difficulty. Of course the desirability of any such extension is a different matter and one worthy of serious, thorough and informed debate.

³⁵ Human Rights Commission Amendment Act 1992