



Australian
Human Rights
Commission

Campbell v Black & White Cabs Pty Ltd and Tighe

[2012] AusHRC 50

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Report into discrimination in
employment on the basis of
criminal record

[2012] AusHRC 50

Australian Human Rights Commission 2012



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Commission**



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Commission**

March 2012

The Hon Nicola Roxon 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 Mr Norman Campbell of discrimination in employment on the basis of criminal record by Black & White Cabs Pty Ltd and Mr John Tighe.

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

By email dated 25 January 2012 Black & White Cabs provided the following response to my notice of recommendations:

That Black & White Cabs Pty Ltd, while respecting the findings and recommendations of the Commission:

1. notes the Commission has not had first-hand experience of Mr Campbell's aggressive and intimidatory conduct but accepts that its submissions in this regard, referenced at paragraph 66 of the Notice under s.35(2) of the *Australian Human Rights Commission Act 1986*, are untested by the Commission;
2. maintains its belief that Mr Campbell has repeatedly demonstrated behaviours inconsistent with the inherent requirements of the role of a taxi driver and so remains unwilling to affiliate Mr Campbell with its organisation, or to compensate Mr Campbell, and does not otherwise intend to take action as a consequence of the Commission's findings or recommendations.

Pursuant to s 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Commission by Mr Norman Campbell. The complaint was made against Black & White Cabs Pty Ltd (B & W) and Mr John Tighe.
2. As a result of the inquiry, the Commission has found that Mr Campbell was discriminated against on the basis of his criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).

2 Summary

4. Mr Campbell was convicted of physical assault in March 2009 and sentenced to imprisonment until June 2009. Mr Campbell had commenced employment as a taxi driver with B & W in or about October 1996. During his imprisonment his Taxi Driver Authority was suspended by the Queensland Department of Transport. Once Mr Campbell's Taxi Driver Authority was reinstated he sought re-affiliation as a taxi driver with B & W. B & W refused his request for re-affiliation on the basis of his criminal record.
5. B & W denies that the decision not to offer Mr Campbell re-affiliation and thus employment as a taxi driver because of his criminal record constitutes discrimination in employment. B & W submits that Mr Campbell's exclusion from employment was based on his inability to perform the following inherent requirements of the job:
 - Willingness to abide by the law; and
 - Self-control in difficult situations.
6. After carefully considering all of the material available to me, I am not satisfied that the exclusion of Mr Campbell from the job of a taxi driver was based on the inherent requirements of that job. In reaching this conclusion I have found the following factors persuasive:
 - After Mr Campbell was released from prison his Taxi Driver Authority was re-instated by the Caboolture Magistrates Court.
 - Mr Campbell apparently successfully complied with the inherent requirements of the taxi driver job at B & W during the period of his employment without any complaints from customers or staff members.
 - Mr Campbell's conviction for assault occasioning bodily harm arose out of a personal family situation and he had no prior convictions (other than a 2005 conviction for soliciting for prostitution for which he was fined).
7. I recommend that B & W pay Mr Campbell \$10 000 in compensation for hurt, humiliation and distress.

3 Outline of complaint

8. Mr Campbell made his complaint to the Commission on 19 January 2010. On 27 April 2010 B & W provided a detailed response to Mr Campbell's complaint. B & W provided further submissions on 15 December 2010.
9. On 5 April 2011, having formed the tentative view that the act relied on by Mr Campbell constituted discrimination, the Commission provided B & W with a further opportunity to make submissions in relation to the alleged act of discrimination (s 27 and s 33 of the AHRC Act). B & W did not make submissions.
10. Mr Campbell provided a written submission to the Commission on 19 June 2011.
11. I consider the following statements about the circumstances which have given rise to the complaint to be uncontentious:
 - in or about October 1996 Mr Campbell commenced as a taxi driver with B & W;
 - on 5 September 2007 Mr Campbell was charged with child stealing and minor assault against an adult in relation to a sensitive family issue;
 - in June 2008 Mr Campbell discussed the charges and the circumstances leading to the charges with Mr Tighe, the General Manager of B & W;
 - in or about December 2008 he was informed that Mr Tighe decided not to renew his taxi license sub-lease with B & W;
 - on 11 March 2009 he was convicted of physical assault, but acquitted of the charge of child stealing, and sentenced to imprisonment until 11 June 2009;
 - during his imprisonment the Queensland Department of Transport suspended his Taxi Driver Authority on the basis of his criminal record;
 - on 19 August 2009 he attended a hearing to appeal the decision to suspend his Taxi Drivers Authority. The magistrate deemed him fit to perform the duties of a taxi driver and reinstated his licence;
 - on 24 August 2009 he wrote to B & W seeking re-affiliation as a taxi driver;
 - by letter dated 25 August 2009 B & W advised that it would not accept his request for work affiliation with B & W on the basis of his criminal record;
 - Mr Campbell appealed the decision through an internal appeals process at B & W (adjudicated by an independent appeals committee), however, the decision was upheld.
12. Mr Campbell alleges that Mr Tighe and B & W discriminated against him on the basis of his criminal record by not renewing his taxi license sub-lease and then denying his request for affiliation with B & W.
13. B & W confirms that Mr Campbell commenced driving a taxi affiliated with B & W in 1996. B & W states that Mr Campbell continued to drive taxis affiliated with B & W until he commenced his prison sentence in March 2009.

14. B & W claims that in May 2008 Mr Campbell sought to surrender his taxi license sub-lease due to family legal issues and the sub-lease was surrendered in June 2008. B & W states that Mr Campbell made several representations between June 2008 and September 2008 seeking another taxi licence sub-lease. B & W claims that due to a high demand for taxi licence sub-leases at this time it was unable to offer one to Mr Campbell.
15. B & W confirms that it was aware of Mr Campbell's criminal record and that it declined his request for re-affiliation with B & W on the basis of his criminal record combined with his 'lack of remorse, arrogant and aggressive attitude, disregard for rules, laws and due process'.¹
16. In its correspondence of 15 December 2010, B & W advised that it did not want to engage in the Commission's process any further.

4 Conciliation

17. The Commission has endeavoured without success to conciliate a settlement of the complaint.

5 Relevant legal framework

18. Part II, Division 4 of the AHRC Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under the International Labour Organization (ILO111) Discrimination (Employment and Occupation) Convention 1958.
19. ILO 111 prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin and other grounds specified by ratifying States.
20. 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.
21. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.²
22. Section 31(b) of the AHRC Act confers on the Commission the following function:
 - (b) to inquire into any act or practice, including any systemic practice, that may constitute discrimination and:
 - (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice constitutes discrimination, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry;...
23. Section 8(6) of the AHRC Act requires that the function of the Commission under s 31(b) be performed by the President.

6 Findings

6.1 Relevant questions to be considered

24. In deciding whether there has been discrimination within the terms of s 31(b) of the AHRC Act, I am required to consider the following questions:

- whether there was an act or practice within the meaning of s 30(1) of the AHRC Act;
- whether that act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record;
- whether that distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- whether that distinction, exclusion, or preference was based on the inherent requirements of the job.

(a) Denial of taxi sub-lease

25. I consider that the failure to grant Mr Campbell a taxi licence sub-lease is an 'act' within the meaning of section 30(1) of the AHRC Act.

26. B & W denies that the decision not to grant Mr Campbell a taxi license sub-lease was based on his criminal record. B & W claims that in 2008 when Mr Campbell surrendered his sub-lease the demand for sub-leases was very strong and the moment one became available it was immediately taken.

27. Both parties were provided an opportunity to provide further information on this issue, however, failed to do so. Accordingly, I find that Mr Campbell has not established that the failure of B & W to grant him a taxi license sub-lease was discriminatory.

(b) Failure to re-instate taxi affiliation

28. I consider that the failure to grant Mr Campbell employment was an 'act' within the meaning of s 30(1) of the AHRC Act. I also consider that this act involved an exclusion that was made on the basis of Mr Campbell's criminal record and that the exclusion had the effect of nullifying or impairing equality of opportunity or treatment in employment. B & W does not dispute these findings.

29. The central dispute between the parties is whether that exclusion was based on the inherent requirements of the job in question.

6.2 Relevant legal principles

(a) International jurisprudence

30. As outlined earlier, a distinction, exclusion or preference in respect of a particular job will not amount to 'discrimination' under s 3(1) of the AHRC Act if the distinction etc is based on the inherent requirements of the job. This exception reproduces, in substance, article 1(2) of ILO 111. The AHRC Act was 'introduced to be the vehicle by which Australia's obligations under [ILO 111] are implemented'.³ For this reason paragraph 3(1)(c) should be construed in accordance with the construction given in international law to article 1(2) of ILO 111.⁴
31. The Governing Body of the International Labour Organisation (ILO) created a committee known as the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts). It is 'orthodox' to rely upon the expressions of opinion of the Committee of Experts for the purposes of interpreting ILO 111.⁵
32. The meaning of article 1(2) was discussed in Chapter 3 of the Committee of Experts' *Special Survey on Equality in Employment and Occupation 1996*:
A qualification may be brought to bear as an inherent requirement without coming into conflict with the principle of equality of opportunity and treatment. In no circumstances, however, may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more grounds of discrimination envisaged by Convention 111 is inadmissible; careful examination of each individual case is required.
33. Similarly, in an ILO Commission of Inquiry regarding a complaint made against the Federal Republic of Germany, it was stated:
It needs to be borne in mind that Article 2, para 1, [of the Convention] is an exception clause. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide.⁶

(b) Identifying inherent requirements

34. In *Qantas Airways v Christie*,⁷ the High Court considered the meaning of the term 'inherent requirements of the particular position' in s 170DF(2) of the *Industrial Relations Act 1988* (Cth). Brennan CJ stated:
The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.⁸
35. In the same case Gaudron J stated:
It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done.⁹
36. Justice Gummow noted that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.¹⁰

37. Similarly, in *X v The Commonwealth*,¹¹ Gummow and Hayne JJ stated that the inherent requirements of employment are those which are 'characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral'.¹²

(c) 'Based on'

38. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,¹³ Wilcox J interpreted the phrase 'based on' as follows:

In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant 'distinction', 'exclusion' or 'preference'. Otherwise, as Mr O'Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereo-typed; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereo-type, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.¹⁴

39. The Full Court affirmed that approach in *Commonwealth v Bradley*¹⁵ (*Bradley*). In particular, Black CJ discussed the phrase 'based on' as follows:

Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group, whether that group be one of gender, race, nationality or age. These considerations must be reflected in any construction of the definition of 'discrimination' presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.¹⁶

40. The Chief Justice then held that there must be more than a 'logical' link between the inherent requirement of the position and the exclusion of the applicant. Rather, his Honour held that there must be a 'tight' or 'close' connection stating:

It is for this reason that I would reject the appellant's argument regarding the expression 'based on' in par (c) of the definition of 'discrimination'. The essence of that argument is that 'based on' requires no more than a logical link, with the result that the exclusion of a category of persons from a particular job will not be discriminatory under the Act if a logical link can be shown between that exclusion and the inherent requirements of the job. In my view, to interpret par (c) in this way would be to defeat the Act's object of promoting equality of opportunity in employment by, in effect, permitting the assessment of persons' suitability for a particular job on grounds other than their individual merit. The nebulousness of notions of 'logic' in this area makes it an inappropriate test for discrimination.¹⁷

41. The Chief Justice further observed:

In my view, the definition adopted by Wilcox J – that is, as requiring a connection that is 'tight' or 'close' – sits easily with the language of par (c) and promotes the objects of the Act by closing a path by which consideration of individual merit may be avoided.¹⁸

42. I also note the decision of the Northern Territory Anti-Discrimination Commission in *Wall v Northern Territory Police*.¹⁹ Northern Territory legislation prohibits discrimination on the basis of 'irrelevant criminal record'. In that decision the complainant, Mr Wall, was convicted for theft when he was 19 years old and sentenced to a six month good behaviour bond. Twenty-five years later, he applied for a position as a police officer with Northern Territory Police. His application was rejected. One of the arguments raised by the Northern Territory Police was that Mr Wall was unable to meet a 'genuine occupational qualification' of the position that all police recruits maintain the integrity of the Northern Territory Police by being free of any adult criminal conviction. The Anti-Discrimination Tribunal rejected this submission, stating:

The burden is on the employer to identify the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked. There must be a 'tight correlation' between the inherent requirements of the particular job and an individual's criminal record and there must be more than a 'logical link' between the job and a criminal record.

I am not satisfied however that the occupational qualification required of recruits by police is sufficiently 'genuine' to qualify as an exemption under s 35. This is because the Respondent has not demonstrated a 'tight correlation' between the purported inherent integrity requirement and the Complainant's spent criminal record.²⁰ (original emphasis, references omitted)

43. It further observed:

It is not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics ... – not just criminal history (spent or otherwise).²¹

(d) Proof

44. The authorities suggest that ordinarily the concept of 'onus of proof' is not directly applicable in administrative proceedings (see particularly *McDonald v Director-General of Social Security* (1984) 6 ALD 6). The position will be otherwise where the legislation being applied by the administrator specifically places an onus on one or other of the parties to establish facts upon which the administrator's decision depends.
45. Further, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 136 ALR 481, Brennan CJ, Toohey, McHugh and Gummow JJ considered that the use of terms such as "balance of probabilities" and "evidence" provides little assistance in the context of administrative decision-making and could be misleading.
46. Nonetheless, in view of the agreed facts in this matter, I can only find in favour of B & W if I am satisfied that the exclusion of Mr Campbell was based on the inherent requirements of the job and that there is a sufficiently tight connection between the inherent requirements of the job and the exclusion of Mr Campbell in the circumstances of this case.

(e) Inherent requirements

47. B & W submit that the inherent requirements for a taxi driver include the following:
- Willingness to abide by the law; and
 - Self-control in difficult situations.

48. I accept that these do amount to inherent requirements given the role and responsibilities of taxi drivers particularly when dealing with the travelling public.

(f) Was the exclusion based on the inherent requirements of the job?

49. In accordance with *Bradley*, the issue for consideration is whether there is a tight or close connection between the inherent requirement of the job of a taxi driver and the relevant distinction, exclusion or preference on the basis of Mr Campbell's criminal record. The following factors are relevant to the assessment.

(i) Circumstances surrounding offence

50. Mr Campbell's conviction for assault occasioning bodily harm arose out of a personal family situation. Mr Campbell was attempting to retrieve his granddaughter from the child's father on behalf of her mother, who had custody. In the course of attempting to secure the child it appears that Mr Campbell placed the child's father in a headlock and kicked him from behind with enough force to cause him to hit the ground.²²

51. It is important to note that Mr Campbell had no prior convictions (other than a 2005 conviction for soliciting for prostitution for which he was fined).

52. While I am not bound by the remarks of the following Judges regarding Mr Campbell's fitness to drive a taxi, I do accord them significant weight.

53. In sentencing Mr Campbell, the sentencing Judge, Judge McGill said:

I take into account that Mr Norman Campbell, in particular, will be unable to drive a taxi for a time, probably at least three years, and possibly longer than that. I would record for the benefit of the Transport Department or the authorities who are involved in the question of dealing with the taxi licence, that my view is that in light of the particular motivation for this offence, the fact that this offence is not a matter which in any way would render him unfit to continue to drive a taxi, and that in light of the references provided, the community would be deprived of someone who is particularly good as a taxi driver, if any suspension or disqualification from holding a licence is placed upon him, but I appreciate that I will not be binding on the authorities concerned.²³

54. Mr Campbell's appeal from his sentence was heard by the Queensland Court of Appeal. Although his sentence of imprisonment was upheld, the members of the court made the following remarks:

McMurdo P: I would endorse, however, the observations of the learned trial judge made for the benefit of the taxi licensing authorities, that the unfortunate and unique circumstances leading to the applicant's commission of this offence would appear to have no bearing on the question of his fitness to continue to drive taxis.

Keane JA: I agree with the reasons of the President and with the order proposed by her Honour. I also agree with her Honour's endorsement of the view that the circumstances of the applicant's offending appear to have little relevance to his fitness to hold a taxi driver's licence.

Chesterman JA: I agree with the reasons of McMurdo P.

55. In September 2009 the Queensland Workplace Rights Ombudsman, Commissioner Brown, investigated allegations that B & W acted unfairly in denying Mr Campbell the necessary approvals to enable him to resume affiliation with B & W. Commissioner Brown was of the view that 'Mr Campbell had been treated unfairly' and strongly suggested that B & W review their decision. Commissioner Brown suggested that B & W consider granting Mr Campbell affiliation for a trial period. B & W responded that it would not allow Mr Campbell to resume as an affiliated driver.

(ii) Taxi Driver Authority reinstated

56. Following Mr Campbell's conviction and sentence the Queensland Department of Transport suspended his Taxi Driver Authority which prevented him from driving as a taxi driver. On 19 August 2009 Mr Campbell successfully appealed the suspension on his Taxi Driver Authority in the Caboolture Magistrates Court and it was subsequently re-instated.

(iii) Previous employment with B & W

57. Mr Campbell states that he worked as a taxi driver with B & W from October 1996. Mr Campbell states that during his employment he always performed his taxi services in a professional and polite manner, without any complaints from customers or staff members. I note that B & W acknowledge that Mr Campbell has driven a taxi for many years with a 'relatively good record'.

7 Conclusion

58. I acknowledge the difficulties inherent in the intense scrutiny of the taxi industry by the travelling public, the government and the media in particular.
59. As I have already indicated, I accept that a willingness to abide by the law and display self-control in difficult situations are inherent requirements of a taxi driver job.
60. In accordance with *Bradley*, discussed above, the issue for consideration is whether there is a tight or close connection between the inherent requirements of the job and the relevant distinction, exclusion or preference. That is, is there a tight or close connection between the inherent requirements and the exclusion that I have found was applied to Mr Campbell on the basis of his criminal record?
61. I am of the view that B & W has not established a tight or close connection as required. In my view, B & W placed insufficient weight on the specific circumstances of the assault conviction, the fact that Mr Campbell had his Taxi Driver Authority re-instated and the comments from judicial officers of the District Court and Court of Appeal of Queensland that the unfortunate and unique circumstances of the offence that led to the surrendering of his license should have 'no bearing' on or 'little relevance' to his fitness to hold a taxi license.
62. I note the difficulties in concluding that Mr Campbell would not be able to abide by the law and display self-control, as a result of his criminal record, where a court of law has assessed Mr Campbell's criminal offence and re-instated his Taxi Driver Authority. I place significant weight on the fact that Mr Campbell satisfied the Caboolture Magistrates Court that he could perform the inherent requirements of being a taxi driver.
63. As noted earlier I am not bound by the comments from judicial officers regarding Mr Campbell's fitness to drive taxis. However, I place significant weight on those remarks which were made in anticipation of Mr Campbell having difficulty satisfying authorities to allow him to continue to drive taxis. The judicial officers were of the view that Mr Campbell's criminal offence had no relevance to his ability to drive taxis.
64. I appreciate that taxi drivers are often faced with difficult situations where self-control and willingness to abide by the law are critical requirements. However, I find it unreasonable for B & W to conclude that Mr Campbell would no longer be able to fulfil these requirements as a result of a criminal offence (relating to a private domestic dispute) where he has successfully complied with these requirements since 1996 without any complaints from customers or staff members. B & W indeed acknowledge that Mr Campbell has driven a taxi for many years with a 'relatively good record'. I am also of the view that, in light of the sensitive domestic motivation for the offending conduct and Mr Campbell's otherwise relatively unblemished criminal record, the criminal offence relied upon has little relevance to fitness to perform the duties of a taxi driver.
65. For the above reasons it is my view that B & W has failed to demonstrate a sufficiently tight correlation between the inherent requirements of a taxi driver job and its decision not to re-affiliate and employ Mr Campbell on the basis of his criminal record. My conclusion is thus that B & W discriminated against Mr Campbell in employment on the basis of criminal record. In the circumstances I do not consider it necessary to give separate consideration to the complaint against Mr Tighe.

66. I note B & W's comments about Mr Campbell's attitude and alleged intimidations towards B & W staff. These claims are untested and even if established do not indicate that Mr Campbell is unable to perform the inherent requirements of the job in question.

8 Power to make recommendations

67. 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.²⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁵
68. 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.²⁶

8.1 Compensation

69. I am of the view that compensation should be paid to Mr Campbell for loss and damage suffered by him. I consider that compensation in the sum of \$10 000 is appropriate. I therefore recommend payment to him of \$10 000. In assessing the sum recommended, I have taken into account the matters discussed below.
70. In considering the assessment of a recommendation for compensation in cases of this type, the Federal Court has indicated that tort principles for the assessment of damages should be applied.²⁷ 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.²⁸

(a) Hurt humiliation and distress

71. Compensation for Mr Campbell'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.²⁹
72. Mr Campbell claims \$185 000 in compensation for hurt humiliation and distress in light of the vast impact the discrimination has allegedly had on his family and himself. Mr Campbell has submitted a number of character references from family members and members of the community.
73. I am satisfied that Mr Campbell, as well as his family, suffered hurt, humiliation and distress as a result of his being discriminated against on the basis of his criminal record. I regard payment to Mr Campbell of a sum of \$10 000 as appropriate compensation for his hurt, humiliation and distress. I do not consider it appropriate to recommend the payment of compensation to any member of his family.

(b) Loss of earnings

74. Mr Campbell seeks \$420 000 compensation for past and future loss of earnings. Mr Campbell submits:
- he has suffered financial hardship because his job applications for alternative employment within the taxi industry have been unsuccessful;
 - that prior to his conviction he enjoyed a moderate income and flexible work hours with B & W;

- he now drives limousines which has drastically decreased his earning and he spends long hours away from home;
 - in 2010 he received a negative income due to having to create a new company and the associated costs;
 - limousine drivers earn considerably less money than taxi drivers;
 - that over the last two years he has relied on borrowed money and reducing his mortgage and other loans to interest only; and
 - he has had to sell personal belongings to survive.
75. I note that Mr Campbell has not provided any written evidence of having been denied employment within the taxi industry or of the reason for any such denial. He states that he only received verbal refusal from Yellow Cabs and notes that there are only two taxi companies in Brisbane. Having regard to the material before me, I am not satisfied that Mr Campbell was denied alternate employment within the taxi industry as a result of any action by B & W. In any event, there is insufficient material before me to quantify any loss of earnings suffered by Mr Campbell after 25 August 2009, the date that B & W failed to reinstate his taxi driver authority.
76. Mr Campbell also seeks compensation for future loss of earnings for a period of 10 years. Again, I am not satisfied that Mr Campbell will suffer any loss of future earnings as a result of any act of B & W. Accordingly, I do not consider it appropriate to recommend the payment of compensation to Mr Campbell for any loss of earnings.
77. By letter dated 23 January 2012, B & W was requested to advise the Commission by 13 February 2012 whether it had taken, or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.
78. By email dated 25 January 2012 B & W provided the following response to my notice of recommendations:
- That Black & White Cabs Pty Ltd, while respecting the findings and recommendations of the Commission:
1. notes the Commission has not had first-hand experience of Mr Campbell's aggressive and intimidatory conduct but accepts that its submissions in this regard, referenced at paragraph 66 of the Notice under s.35(2) of the *Australian Human Rights Commission Act 1986*, are untested by the Commission;
 2. maintains its belief that Mr Campbell has repeatedly demonstrated behaviours inconsistent with the inherent requirements of the role of a taxi driver and so remains unwilling to affiliate Mr Campbell with its organisation, or to compensate Mr Campbell, and does not otherwise intend to take action as a consequence of the Commission's findings or recommendations.
79. I report accordingly to the Attorney-General.



Catherine Branson
President
 Australian Human Rights Commission
 March 2012

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- 1 Letter from Praeger Ellem Solicitors to Commission, 15 December 2010, 3.
 - 2 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
 - 3 *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 [35] (Black CJ).
 - 4 *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635, 642 [31] and following.
 - 5 *Ibid*, 644 [36].
 - 6 (1987) 70 ILO Official Bulletin, Ser B, Supp 1.
 - 7 (1998) 193 CLR 280.
 - 8 *Ibid*, 284.
 - 9 *Ibid*, 295.
 - 10 *Ibid*, 318.
 - 11 (1999) 200 CLR 177.
 - 12 *Ibid*, 208.
 - 13 (1998) 158 ALR 468.
 - 14 *Ibid*, 482.
 - 15 (1999) 95 FCR 218.
 - 16 *Ibid*, 235 [36]
 - 17 *Ibid*, 235-6 [37]
 - 18 *Ibid*, 237 [40]
 - 19 Unreported, Northern Territory Anti-Discrimination Commission, Commissioner Fitzgerald, 22 April 2005.
 - 20 *Ibid* [5.3.5].
 - 21 *Ibid* [5.3.8].
 - 22 *R v Campbell* [2009] QCA 95 (Unreported, McMurdo P, Keane and Chesterman JA, 21 April 2009).
 - 23 Referred to in *Campbell v Queensland Transport* (Unreported, Caboolture Magistrates Court, 19 August 2009).
 - 24 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
 - 25 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
 - 26 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
 - 27 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J) [55].
 - 28 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
 - 29 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

Further Information

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