Australian Human Rights Commission

Johansson v Masonic Homes Inc

[2014] AusHRC 65

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Johansson v Masonic Homes Inc

Report into unlawful discrimination in employment based on criminal record

[2014] AusHRC 65

Australian Human Rights Commission 2014

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Contents

Australian
Human Rights
Commission

22 January 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Ms Edda Johansson against Masonic Homes Inc.

I have found that Masonic Homes discriminated against Ms Johansson on the basis of her criminal record.

By letter dated 3 June 2013, Masonic Homes provided a response to my findings and recommendations. The response is set out below:

> Masonic Homes has considered the findings of the President in relation to the complaint of Ms Johansson.
>
> Masonic Homes again states at the outset that it sincerely regrets that Ms Johansson has been aggrieved by the events of this matter.
>
> However, with the greatest respect, Masonic Homes maintains its stance that there was no discrimination in Masonic Homes' treatment of Ms Johansson.
>
> Masonic Homes maintains its stance that requiring its employees to be trustworthy and of good character are fundamental requirements. Masonic Homes regards this as especially important given its stringent duty as an Approved Provider under the *Aged Care Act 1997*.
>
> While Masonic Homes agrees that the highest standard of integrity, and to be of good character and reputation are inherent requirements of the position of Administration Officer given its responsibilities for elderly clients, Masonic Homes view is that the circumstances disclosed by Ms Johansson were inconsistent with those inherent requirements.

Australian Human Rights Commission

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In that light Masonic Homes maintains the view set out in our letter of 30 April 2012. Accordingly, it does not propose taking any action as a result of the findings and recommendations of the President.

Please find enclosed a copy of my report.

Yours sincerely

Gillian Triggs
President
Australian Human Rights Commission

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission. It follows an inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Commission by Ms Edda Johansson against Masonic Homes Inc.

2. As a result of this inquiry, the Commission finds that Masonic Homes Inc discriminated against Ms Johansson on the basis of her criminal record.

3. The inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).

2 Summary

4. Ms Johansson has a criminal record dating from 1998 to 2001. It relates to obtaining prescription drugs illegally at a time when she had an addiction to prescription painkillers. She applied for and was offered employment as an Administrative Officer with Masonic Homes, but this offer of employment was withdrawn following receipt of her criminal record.

5. Masonic Homes denies that the decision to withdraw the offer of employment constitutes discrimination in employment. Masonic Homes submits that the decision was based on Ms Johansson's inability to perform the inherent requirements of the job.

6. After carefully considering all of the material available to me, I am not satisfied that the exclusion of Ms Johansson from the position of Administration Officer was based on the inherent requirements of that job. In reaching this conclusion I have found the following factors persuasive:

    - Ms Johansson's offences were nearly ten years old at the relevant time.
    - Ms Johansson's offences occurred during a difficult time for her personally which led to her prescription drug addiction and the relevant offences.
    - Since the period of offending, Ms Johansson has successfully completed a university degree and held employment with a number of employers which involved handling large sums of money.

7. I recommend that Masonic Homes pay Ms Johansson $11,155 in compensation for hurt, humiliation and distress and economic loss.

3 Outline of complaint

8. Ms Johansson's complaint was received by the Commission on 7 January 2011.

9. Ms Johansson states that on 17 December 2010 at 1pm she attended an interview with Masonic Homes, for employment as an Administration Officer at their Ridgehaven, South Australia Community Care location. The interview went very well and a salary of around $40,000 plus was discussed.

10. At 5pm that same day she received a telephone call from Ms Sheryn Fisher, Team Leader, who offered her the position and asked her to start work on 29 December 2010. Ms Johansson accepted. Some fifteen minutes later Ms Fisher called again and asked Ms Johansson to drop off to the office some personal identification.

11. Ms Johansson further states:

- On 21 December 2010, she telephoned David Jones in Adelaide's CBD to decline a position she had been offered there. She also took her identification documents and national police clearance certificate dated 1 September 2010 to Masonic Homes. She met with Ms Pat Puntin of Masonic Homes, and explained her conviction dated May 2001. She also showed Ms Puntin her court procedure papers and told her she had no problem leaving them with Ms Puntin, but was told that was not necessary. Ms Puntin showed no concern about the conviction and replied that 'we all have skeletons in our closets'. Prior to leaving the office she was introduced to all other staff and shown what would be her work station.
- One hour later she received a telephone call from Ms Puntin asking for further identification documents with her current name, as her passport was in her maiden name.
- On 23 December 2010 she dropped off the extra documents, and the staff member she left them with said 'I'll see you on the 29th when you start work'.
- Some 45 minutes later, she received a telephone call from Ms Ritu Datla in Human Resources. Ms Datla inquired whether she could ask Ms Johansson a question about her police clearance, and told her she did not have to answer. She asked what the conviction on Ms Johansson's police clearance was related to. Ms Johansson explained that ten years ago she had unfortunately become addicted to pethidine, a prescription drug, because of having migraine headaches and had tried to obtain it under false pretences. Ms Datla said 'Oh, okay, that's no problem', and also added that she hadn't received Ms Johansson's signed contract yet. Ms Johansson replied that the contract and tax declaration form were not in the starter kit given to her. Ms Dalta told her they would be at work for her on 29 December when she started.
- On 24 December 2010, Ms Johansson received a telephone call from Ms Jane Pickering, General Manager at Masonic Homes. Ms Pickering said that Ms Johansson could not have the job as Administration Officer because of her police clearance. Ms Johansson was shocked and dismayed and told her that the offence was totally unrelated to the job and was nearly ten years ago and would soon not even appear on police checks.
- Ms Pickering told her that the police clearance would always show her offences, that Ms Johansson had '9 Impositions, that is fraud', and she could not possibly give her a job where she would be handling large sums of money.
- Ms Johansson told her that no other employer had ever had a problem with her police clearance.
- Ms Pickering said that on her application form it notes that she would be successful according to her police clearance, so she was sorry but she could not give Ms Johansson the job, 'and it would be useless for you to apply for any position at any other aged care facility because they will not give you a job either with a criminal record like yours.'
- Ms Johansson tried to explain that she had previously worked at a nursing home but Ms Pickering interrupted her, and said that there is new legislation and aged care cannot employ anyone with a criminal record and run a special police check so they can see any old convictions even over ten years old.

12. Ms Johansson says by way of background that she is 57 years old. She was previously married for 27 years and 'successfully raised 2 children under sufferance of severe domestic violence and gambling of household income by her then husband'. The stress and violence resulted in her suffering depression and chronic migraine headaches and body pain. Her doctor prescribed large doses of Pethidine, an opioid, and she became addicted to the drug. She falsely represented herself to obtain additional prescriptions for Pethidine from a number of other doctors.

13. Ms Johansson underwent compulsory drug rehabilitation monitored by the Drug Court and remarried in 2002. Having never had the opportunity to complete secondary school, she gained entry to the University of South Australia. She completed a Bachelor of Social Science (Human Services) in 2006.

14. Ms Johansson submitted that her previous employment has included:

- 2006 to 2008 providing counselling within doctor's surgeries;
- 2005 to 2006 Playford Nursing Home, including dealing with residents' finances;
- 1997 to 2005 Procode Software Pty Ltd handling records, banking and wages;
- 1989 – 1996 David Jones Pty Ltd, Supervisor Cosmetics, handling large sums of money and supervising over 30 staff.

15. Ms Johansson says that her criminal record will shortly be regarded as 'spent' by the South Australian police as it will be ten years old. Her national police clearance certificate issued 1 September 2010 lists as follows:

29 July 1998 *Larceny*	*Without conviction*	*Fined $350*
29 July 1999 *Obtain prescription drug by false representation*	*Without conviction*	*Without conviction* *BOND $500 to be of good behaviour for 2 years*
31 May 2001 *Imposition (9)*	*Convicted*	*3 months imprisonment* *BOND $500 to be of good behaviour for 12 months* *Compensation $279.50*

4 Response

16. On 23 March 2011, the Commission received a response from Masonic Homes.

17. Masonic Homes is a not for profit benevolent institution licensed by the Australian Government as an Approved Provider under the *Aged Care Act 1997* (Cth). It operates within a heavily regulated reporting and operating regime. It has over 400 residential care beds, almost 900 independent living units and 270 community care packages. These services are provided principally to the frail, elderly and disadvantaged. Masonic Homes is obliged, pursuant to the Aged Care Act, to require that all its employees provide, and have at all times, a police clearance which is no more than three years old.

18. Ms Johansson was offered a job as described in her complaint. Several senior members of staff at Masonic Homes held a meeting to discuss her suitability for the position. It was decided during this meeting that Ms Johansson's police record was inconsistent with the employment offered having regard to the nature of the position, Masonic Homes' position as an Approved Provider and the content of the police record.

19. On 24 December 2010, Ms Johansson was advised that the offer of employment had been withdrawn. Masonic Homes denies that it told her 'it would be useless for you to apply for any position at any other Aged Care Facility because they will not give you a job either with a criminal record like yours' as has been alleged. Masonic Homes did advise Ms Johansson that she would be required to provide a police clearance when applying for any employment with an aged care provider as this is a requirement under the Aged Care Act.

20. Masonic Homes concluded that Ms Johansson did not meet the inherent requirements of the position. The position of administration officer required the successful candidate to have the highest standard of integrity and to be of good character and reputation. These inherent requirements existed because:

    - the position involved predominantly dealing with elderly, often vulnerable, clients;
    - the position involved the handling of cash from these elderly, vulnerable clients;
    - in addition, a significant proportion of the clients were on prescription medication;
    - the person in this position generally developed a relationship with the clients as the first and/or regular point of contact at Masonic Homes' Ridgehaven Office;
    - elderly clients tend to be easily influenced and this, combined with a relationship of trust, may have led to clients being taken advantage of. This, in addition to Ms Johansson's history of obtaining prescription medication via illegal means, caused Masonic Homes significant concern; and
    - as an Approved Provider, Masonic Homes has a particularly stringent duty to ensure that its staff are of good character and reputation.

21. Further considerations included:

    - Ms Johansson falsely informed Masonic Homes that she had not been imprisoned. The police record revealed a sentence of imprisonment.
    - Ms Johansson had committed a number of offences ranging over a period of approximately three years and had breached a good behaviour bond on the last occasion.
    - The criminal behaviour was not merely a single indiscretion and the offences were serious.
    - Although Ms Johansson advised that the offences resulted from domestic abuse and her personal situation had since improved, Masonic Homes was concerned that a future incident in her personal life could trigger a re-occurrence of the behaviour. This was an inappropriate risk given Masonic Homes' clients.
    - Masonic Homes was concerned about what effect there would be upon its elderly and vulnerable clients if Ms Johansson's criminal convictions became known to them.

22. Based on the above factors, Masonic Homes states that it believed there was a tight correlation between the inherent requirements of the position and its obligation to protect its elderly and vulnerable clients, and Ms Johansson's criminal record.

5 Conciliation

23. The Commission endeavoured without success to conciliate a settlement of the complaint. A conciliation conference was held on 21 February 2011, however the matter did not resolve.

24. On 24 November 2011, a directions hearing was held before former President Branson. Masonic Homes clarified that the position offered to Ms Johansson involved processing charges for services, receiving cash payments from elderly clients and reconciling these payments, possibly in the amount of $500 to $1000.

25. Ms Johansson noted that she had never been imprisoned. She stated that she was employed by the Playford Nursing Home for six months, where she handled the front desk and cash and prescription drugs. She stated that they didn't actually want her to leave. Ms Johansson also submitted that she had worked for years as a supervisor at David Jones, handling tens of thousands of dollars in cash.

26. Masonic Homes said that it was aware of Ms Johansson's previous employment from her curriculum vitae. However Masonic Homes maintained that Ms Johansson's criminal record made it too great a risk to employ her in this position, given its responsibilities to its vulnerable clients.

6 Relevant legal framework

27. 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 *Discrimination (Employment and Occupation) Convention* 1958 (ILO 111).

28. 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.

29. 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.

30. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.[1]

31. 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;
>
> …

32. Section 8(6) of the AHRC Act requires that the function of the Commission under s 31(b) be performed by the President.

7 Findings

7.1 Relevant questions to be considered

33. In deciding whether there has been discrimination within the terms of section 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 section 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.

34. I consider that the withdrawal of the offer of employment previously made to Ms Johansson is an 'act' within the meaning of section 30(1) of the AHRC Act.

35. I am satisfied that the decision of Masonic Homes to withdraw the offer of employment to Ms Johansson involved an exclusion based on her criminal record.

36. I am also satisfied that this exclusion had the effect of nullifying or impairing equality of opportunity or treatment in employment.

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

7.2 Relevant legal principles

(a) International jurisprudence

38. 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 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'.[2] 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.[3]

39. 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.[4]

40. 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.

41. 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.[5]

(b) Identifying inherent requirements

42. In *Qantas Airways v Christie*,[6] 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.[7]

43. 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.[8]

44. Justice Gummow noted that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.[9]

45. Similarly, in *X v The Commonwealth,*[10] 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'.[11]

(c) 'Based on'

46. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,[12] 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 stereotyped; 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.[13]

47. The Full Court affirmed that approach in *Commonwealth v Bradley*[14] (*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.[15]

48. 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 complainant. 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.[16]

49. 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.[17]

50. I also note the decision of the Northern Territory Anti-Discrimination Commission in *Wall v Northern Territory Police.*[18] 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.[19]

51. 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).[20]

(d) Inherent requirements

52. An inherent requirement is something which is essential to the position, as opposed to a more peripheral requirement. Masonic Homes submits the inherent requirements of the role of administrative officer include the highest standard of integrity and to be of good character and reputation.

53. Having regard to the responsibilities of Masonic Homes for elderly clients, I accept that the highest standard of integrity and to be of good character and reputation are inherent requirements of the role of administrative officer.

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

54. In accordance with *Bradley*, the issue for consideration is whether there is a tight or close connection between the inherent requirement of the position and the relevant distinction, exclusion or preference on the basis of Ms Johansson's criminal record. Assessments of prospective employees against inherent requirements should look at the circumstances and the age of the criminal record, as well as considering other evidence, such as recent patterns of behaviour.

55. I note that Ms Johansson's period of offending occurred from 1998 to 2001, some nine and a half years before Ms Johansson applied for the position with Masonic Homes. Ms Johansson has explained that she was in very difficult personal circumstances at the time which led to her prescription drug addiction and the relevant offences. She has since participated in a drug rehabilitation program. She has also completed a university degree and remarried. She has held down employment with a number of employers without incident. Some of these positions involved handling money.

56. It appears that there was other information available to Masonic Homes and factors that could have been taken into account regarding Ms Johansson's trustworthiness and ability to perform the inherent requirements of the job. Indeed it is difficult to see what more Ms Johansson could have done to rehabilitate herself in the 9.5 years since her period of offending.

57. Having regard to the totality of the material presently before me, I find that the connection between the inherent requirements and the exclusion of Ms Johansson was not sufficiently close.

8 Conclusion

58. I accept that the highest standard of integrity, and to be of good character and reputation, are inherent requirements of the position of Administration Officer with Masonic Homes, given its responsibilities for elderly clients.

59. However, I find that Masonic Homes has failed to demonstrate a sufficiently tight correlation between Ms Johansson's criminal record and her alleged inability to meet the inherent requirements of the job for the following reasons:

- Ms Johansson's offences were almost ten years old at the time that she applied for the job with Masonic Homes.
- There were mitigating personal circumstances surrounding the offences.
- Since the period of offending, Ms Johansson has successfully completed a university degree and held employment with a number of employers which involved handling large sums of money. There is no suggestion that she was not found trustworthy in these workplaces.

60. Therefore I find that Masonic Homes' decision to withdraw the offer of employment because of Ms Johansson's criminal record constitutes discrimination in employment on the basis of her criminal record.

9 Power to make recommendations

61. 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.[21] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[22]

62. 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.[23]

9.1 Compensation

63. I am of the view that compensation should be paid to Ms Johansson for loss and damage suffered by her. I consider that total compensation in the sum of $11,155 is appropriate and therefore recommend payment to her of $11,155. In assessing this sum, I have taken into account the matters discussed below.

64. The Federal Court has indicated that tort principles for the assessment of damages should be applied to the assessment of cases of this type.[24] 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.[25]

65. In relation to any loss or harm suffered, Ms Johansson submitted by letter dated 13 March 2012 that she felt humiliated and stressed after the offer of employment was withdrawn; that she slipped back into depression; and that she is still unemployed due to depression. She has decided to further her education and career in mental health. She provides a supporting letter from a psychologist, who states that she has seen Ms Johansson for several years due to her anxiety and depression and some symptoms of PTSD. Ms Johansson also provides a letter from Dr Kelly, her treating psychiatrist since 2007, confirming that she suffers from anxiety and depression and is treated with an antidepressant.

66. I note that the letters from Ms Johansson's psychologist or psychiatrist do not refer to the withdrawal of the offer of employment or its impact on her mental health.

67. Ms Johansson submitted that she refused another job offer at David Jones in order to accept this position. She seeks compensation of twelve months' salary.

68. In its response of 30 April 2012, Masonic Homes submits that the medical reports simply state that the anxiety and depression suffered by Ms Johansson existed prior to her dealings with Masonic Homes, and there was no medical evidence that Ms Johansson was medically unfit for work for any period of time.

(a) Hurt, humiliation and distress

69. Compensation for Ms Johansson'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.[26]

70. I am satisfied that Ms Johansson suffered hurt, humiliation and loss of self-confidence as a result of being discriminated against on the basis of her criminal record. I regard payment to Ms Johansson of a sum of $5000 as appropriate compensation for hurt, humiliation and distress.

(b) Loss of earnings

71. Had the discriminatory conduct not occurred, Ms Johansson would have commenced work in the Administration Officer position on 29 December 2010. Ms Johansson states that she refused another job offer at David Jones on the basis of being offered this position. Ms Johansson submits that after the offer of employment was withdrawn, she slipped back into depression; and that as at March 2012 she was still unemployed due to depression. She has decided to further her education and career in mental health. She seeks compensation of twelve months' salary.

72. Masonic Homes submitted on 30 April 2012 that:

> Even if, as Ms Johansson has suggested, this situation has caused her to "slip back into depression", there is no medical evidence that she has been affected to the point of being unable to work for a 12-month period preceding December 2010. We note that neither report indicates any period in which Ms Johansson was too ill to work.

73. I agree that the two medical reports simply state that Ms Johansson's anxiety and depression was pre-existing, and neither of them makes specific reference to the impact on Ms Johansson of the withdrawal of the offer of employment. I also note that the reports do not state that Ms Johansson is unfit for work, or was unfit for work for any period. However I accept Ms Johansson's statement that she has not worked since the withdrawal of the offer of employment by Masonic Homes.

74. I am of the view that the period of time over which Ms Johansson may appropriately seek to be compensated for economic loss is 2 months, representing the period of time it is likely to have taken Ms Johansson to find alternative employment.

75. I have not been provided with any evidence of the actual salary Ms Johansson would have been paid in the position, other than her statement that at the interview a salary of '$40 000 plus was discussed'. On this basis, the sum of $6,155 represents a guide to the loss of earnings that it is likely that Ms Johansson suffered in an 8 week period. I therefore recommend an amount of $6,155 should be payable for loss of earnings.

76. I report accordingly to the Attorney-General.

Gillian Triggs
President
Australian Human Rights Commission

22 January 2014

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1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
2 *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 [35] (Black CJ).
3 *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635, 642 [31] and following.
4 Ibid, 644 [36].
5 (1987) 70 ILO Official Bulletin, Ser B, Supp 1.
6 (1998) 193 CLR 280.
7 *Qantas Airways v Christie* (1998) 193 CLR 280, 284.
8 Ibid, 295.
9 Ibid, 318.
10 (1999) 200 CLR 177.
11 Ibid, 208.
12 (1998) 158 ALR 468.
13 Ibid, 482.
14 (1999) 95 FCR 218.
15 Ibid, 235 [36].
16 Ibid, 235-6 [37].
17 Ibid, 237 [40].
18 [2005] NTADComm 1 (22 April 2005).
19 Ibid [5.3.5].
20 Ibid [5.3.8].
21 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
22 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
23 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
24 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 [55] (Wilcox J).
25 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
26 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

Further Information

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