

14 August 2009

Scrutiny of Acts and Regulations Committee
C/- Andrew Homer
Parliament House
Spring Street
East Melbourne VIC3002

By fax: 8682 2858

Dear Mr Homer,

**Inquiry into Exceptions and Exemptions to the *Equal Opportunity Act 1995*
(the Inquiry) - Political Employment Exception**

On 4 August 2009, Ian Scott of our office attended a public hearing to give evidence to the Scrutiny of Acts and Regulations Committee (SARC) regarding JobWatch's submission to the Inquiry.

During Mr Scott's evidence to SARC, the Honourable Mr Ryan Smith MLA asked JobWatch to provide further information about how JobWatch's proposed "inherent requirements of the job" exception would work in practice were it to replace the current exception relating to political employment. Below is that further information.

The hypothetical scenario contemplated is that of a member of a political party applying for a clerical/electorate officer job in the electorate office of a member of an opposing political party.

Summary

(a) No blanket exceptions to the Act

There should not be any blanket exceptions from or exemptions to the Act. If an employer wishes to seek an exemption, then it should be required to apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order that it be exempted. In considering whether to exempt the employer, VCAT should have to consider the objective of the Act being to eliminate discrimination as far as possible, the Charter of Human Rights and Responsibilities, the public interest and any unjustifiable hardship on the employer of not receiving the exemption. This might mean, for example, that

a political employer will be granted an exemption when employing a senior ministerial advisor but not when employing an electorate officer.

(b) “Inherent requirements of the job” – new exception

Alternatively, an “inherent requirements of the job” exception can replace the current “political employment” exception as well as a number of other exceptions to unlawful discrimination in the area of employment because legal obligations owed to employers by employees are well established under the common law meaning the political employment exception is not actually required.

(c) Defence to a claim of “political belief or activity” discrimination

If the true reason for a person with the attribute of “political belief or activity” not being employed is that the potential employer believes there is a likelihood that they will breach their employment contract and/or be unable to perform the inherent requirements of the job and another applicant in the “same or similar circumstances” without the attribute of political belief e.g. an applicant with poor references or a cadet journalist etc. would also not be employed for the same reasons then unlawful discrimination will arguably have not occurred. On this view, if it did not become a new exception, the “inherent requirements of the job” could at least provide a defence to political employers where a claim of political activity or belief discrimination was made.

Background

1. Under the *Equal Opportunity Act 1995* (the Act), it is unlawful to discriminate against a person in the area of employment on the basis of that person’s “political belief or activity”.
2. The Act defines “political belief or activity” to mean:
 - (a) holding or not holding a lawful political belief or view; and
 - (b) engaging in, not engaging in or refusing to engage in a lawful political activity.
3. Unlawful discrimination can be direct or indirect.

Direct discrimination

4. Direct discrimination means treating, or proposing to treat, someone with the attribute of “political belief or activity” less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.
5. The attribute need not be the only or dominant reason for the discriminatory treatment, so long as it is a substantial reason.

Indirect discrimination

6. Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice-
 - (a) that someone with an attribute does not or cannot comply with; and
 - (b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and
 - (c) that is not reasonable.

In JobWatch’s opinion, it does not appear that indirect discrimination is relevant because it is not usually a requirement, condition or practice that all employees of political parties be members of that party and, even if it was, it is ordinarily not a requirement, condition or practice with which a person cannot comply except by choice.

Exception – political employment

7. An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

This means that, currently under the Act, an electorate office is entitled to deny an applicant a job based solely on their membership of an opposing or alternative political party or faction or simply due to the non-membership of the political party offering the job.

Second Reading Speech, Explanatory Memorandum & case law

8. Unfortunately, the Act's Second Reading Speech and Explanatory Memorandum do not discuss the original rationale for or intention of the political employment exception.
9. JobWatch's research also indicates that there is very little case law in this area and, as far as we can tell, no cases are directly on point. Generally speaking, the Courts/Tribunals have determined that a person holds a political belief or engages in political activity when they express an opinion or pursue courses of action with a view to changing or influencing government.¹

Intention of the political employment exception

10. As there is no further information available, it will be presumed that the intention of the political employment exception is to allow political parties and members of political parties to attempt to protect against the disclosure of confidential information and other such "leaks" etc that can be damaging to political parties as opposed to granting political employers an unassailable right to only employ party members or sympathisers to the exclusion of all others.

Inherent requirements of the job exception

11. JobWatch's submission to the Inquiry proposes that many of the current exceptions contained within the Act in relation to the area of employment could be repealed and replaced with the "inherent requirements of the job" exception which would incorporate the following elements:
 - (a) a statement that discrimination in employment is prohibited on the basis of a protected attribute e.g. "political belief or activity", unless a person with that attribute is unable to perform the inherent requirements of the particular employment; and
 - (b) a list of the factors to be considered when determining whether a particular requirement is "inherent" to a position.

In relation to political employment, this list should include:

- Whether a particular task is genuinely essential to the position;

¹ Chris Ronalds, *Discrimination Law and Practice*, 3rd ed, Federation Press, p29.

- The skill set and qualifications required to do the position; and
 - An ability to comply with any lawful and reasonable contractual obligations.
12. Therefore, in the hypothetical scenario of the electorate officer, the inherent requirements of the job would entail the following:
- a. clerical and administrative duties;
 - b. ability to deal with the general public and government departments etc;
 - c. any other duties contained in the employee's written employment contract e.g. to obey lawful and reasonable directions; and
 - d. any other contractual obligations implied by law.
13. Consequently, it is clear that a person does not need a specific political belief to perform the inherent requirements of the role of electorate officer and so they should not be discriminated against on the basis of their political belief or activity.

Other concerns & contractual safeguards

14. It seems that the real concern underlying the political employment exception is that an employee who was a member of an opposing political party or faction, presuming that they would actually apply for such a job, could not be trusted to carry out their role in accordance with their contractual obligations whether express and implied.
15. It is important to note that the common law imposes a number of duties upon employees, which operate effectively to prevent employees from working in a manner inconsistent with their contract of employment. For instance, employees are required to carry out their duties with reasonable care and skill, to obey their employer's lawful and reasonable instructions and to comply with their duty of loyalty and fidelity.
16. The obligations of an employee under any contract of employment may include:
- a (possible) duty to disclose sufficient information to a prospective or current employer about oneself to enable the employer to make a properly informed decision about the employment of an individual;
 - competence in the subject work;

- the exercise of care in doing the work;
- obedience to lawful orders;
- good faith in acting on behalf of the employer's interests;
- honesty in dealing with employer's money and property;
- an obligation to treat the employer with respect (in return for respect given by the employer);
- confidentiality in dealing with certain work-related information;
- an obligation to report (to an employer) breaches of duty by other employees in certain circumstances;
- a duty to make available to the employer any inventions made in the course of employment;
- a duty to act in a manner not harmful to third parties; and
- (in certain cases) a restriction on a current or former employee competing (in business) against the employer or former employer.

17. These obligations may also be inherent requirements of a particular job, especially if an employee has a written contract of employment expressing them as such.

18. It is therefore submitted that a person who is unwilling or unable to fulfil these fundamental obligations should be disqualified from employment on that basis, rather than on the basis of their political beliefs, which may not have any effect on his or her capacity or desire to perform a particular role.

19. If, however, a person does not work faithfully or in accordance with their contract of employment, an employer would be reasonably entitled to exercise his or her rights to terminate the employment. The general body of employment law is the appropriate mechanism to deal with this, rather than legislation which is intended to eliminate discrimination yet authorises it via exceptions to the Act.

20. Therefore, if the intention or concern of the political employment exception is to safeguard against breaches of confidence or other such "leaks" etc that

can be damaging to political parties, as opposed to giving political employers an unassailable right to only employ party members or sympathisers to the exclusion of all others, then the political employment exception is not needed as such issues can be dealt with via employment and contract law.

21. In the event of a breach of contract by an employee, the Courts can make orders and provide a remedy to the employer e.g. an injunction and/or damages. Remedies can also be found against third parties for inducing an employee to breach their contract pursuant to the tort of interference with contractual relations.

Defence to a claim of political belief or activity discrimination

22. In the event that a claim of unlawful discrimination was made against a political party or member because an unsuccessful job applicant was a member of a different or opposing political party or factional group, the political employer would be entitled to defend the claim on the basis that the applicant's political belief or activity was not a reason or was not a substantial reason for the decision to not employ the applicant.
23. The real or substantial reason for not employing the applicant would be, not their political belief or activity, but because of the risk, regardless of whether real or merely perceived, that the job applicant could accidentally or, as a result of inducement or coercion, deliberately breach their contract of employment and cause damage to the employer.
24. In other words, the decision not to employ the applicant was made because the applicant would be unable to fulfil the inherent requirements of the job. This position could be supported through information gained during the interview process, through undertaking reference checks etc and through have a comprehensive written employment contract detailing the employee's obligations to the employer.
25. Direct discrimination requires a comparison between the person alleging unlawful discrimination and a person in the "same or similar circumstances" without the attribute of political belief or activity. Unlawful discrimination will be found not to have occurred if a person in the same or similar circumstances without the attribute of political belief or activity would also not have been employed.
26. It is therefore submitted that a person in the "same or similar circumstances" here would be another job applicant without the attribute of political belief or activity who would also be unlikely to comply with their contractual

obligations and/or be able to perform the inherent requirements of the job such as, for example, a person with poor references/work history, a political, investigative or cadet journalist etc. If these other applicants would also be rejected by the political employer then unlawful discrimination should not be found to have occurred.

27. On this view, if the “inherent requirements of the job” did not become a new exception under the Act, it could at least be codified as a defence to political belief or activity discrimination.

Conclusion

28. Whilst political employers may feel comforted to have the protection of the political employment exception to the Act which essentially authorises political employers to commit political activity or belief discrimination by allowing them to only hire party members or sympathisers (the salaries of which are often paid for using public funds) such a blanket exception is, in practice, not required.
29. As shown above, the “inherent requirements of the job exception”, if adopted, would provide a fairer and better means for balancing the interests of political employers and the right of job applicants not to be unlawfully discriminated against.
30. If it did not become an exception, the “inherent requirements of the job” would at least provide a defence to political employers should a claim of unlawful discrimination be made.
31. Therefore, as it stands, the current political employment exception is an unjustifiable limitation on human rights and so should be repealed.

Yours sincerely,

JOB WATCH INC

per
Ian Scott