Work and employment

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IT IS (NOT) OK TO OFFER "BLACK BABIES" TO INDIGENOUS EMPLOYEES IN THE COMMONWEALTH PUBLIC SERVICE

Ms Vata-Meyer was an Indigenous Commonwealth public service employee who complained of racial discrimination at work. Dissatisfied with the outcome of the process following her internal complaint about the behaviour of her colleagues, she lodged a discrimination complaint under the *Racial Discrimination Act 1975* (Cth) (the Act) with the Australian Human Rights Commission, and subsequently the Federal Circuit Court (FCC). The latter dismissed her claim, and she appealed to the Full Court of the Federal Court which set aside the first decision and remitted the matter to the FCC for rehearing on certain aspects: *Vata-Meyer v Commonwealth* [2015] FCAFC 139.

While the claim was brought under anti-discrimination legislation, there are interesting features of the case that overlap with work health and safety law and administrative law. For example, the chief alleged discriminator was the departmental Work Health and Safety (WHS) officer, and Vata-Meyer invoked administrative law arguments on appeal to successfully demonstrate error by the FCC. The facts of the case are strong, and it is difficult to understand why Vata-Meyer was not also successful at first instance. The reason lies less in the evidence before the FCC than in the primary judge's confused approach to s 9(1) of the Act, including omissions when determining factual matters. The primary decision demonstrates the battle faced by complainants to prove racial discrimination and a profound judicial discomfort in handling such cases.

On appeal, the Full Court reminds us of the elements of s 9(1) and of the need for tribunals of fact to systematically address each of them, including making the necessary findings of fact in light of the relevant evidence adduced. It also clarifies aspects of the law, eg, the separate relationship between an employer's investigation into a discrimination complaint in the workplace and the discriminatory conduct itself. While the appellant deservedly won on appeal, the remittal has the unfortunate consequence of prolonging her ordeal in the courts.

BACKGROUND

Vata-Meyer was employed in the Indigenous Graduate Recruitment Program in the Commonwealth Department of Education, Employment and Workplace Relations (Department). She commenced duties in Canberra in February 2011.[1] The focus of her discrimination claim concerned the conduct of her colleague, Mr Lee, on 28 September 2011 and the Department's management of her complaint about that conduct.[2] The specifics of his impugned conduct comprised: (a) his offering her (and her colleagues) Chico lollies during an informal work gathering in their shared corral, remarking "have some black babies"; (b) later the same day offering again the same lollies to her and colleagues at a team afternoon tea, after she had made it clear to him that she was angry and offended, saying: "Guys, here are some black babies"; and (c) at the same afternoon tea making gratuitous references to "Michael Jackson" and "Coon cheese", calling out "I like Coon" and "I like Coon cheese" in response to a question about the difference between Camembert and Brie cheese.

Vata-Meyer also complained that the Department's management of certain employment and performance issues was (racially) discriminatory. She first complained internally, however, in April 2012, following what she felt was an inadequate departmental response she took the complaint to the Commission, which terminated the complaint because there was no reasonable prospect of settling. She then brought her application in the FCC.

[1] Employed in February 2010, Vata-Meyer commenced duties in February 2011 having taken leave without pay for the first 12 months. The events occurred from August 2011 to April 2012: *Vata-Meyer v Commonwealth* [2014] FCCA 463, [12]-[43].

[2] See *Vata-Meyer v Commonwealth* [2014] FCCA 463, [49]-[51].

LEGISLATIVE PROVISIONS

The case involved ss 9, 15, 18 and 18A of the Act. Vata-Meyer claimed that her colleagues and superiors in the Department unlawfully discriminated against her on the basis of her race contrary to s 9. She also argued that the impugned conduct constituted unlawful discrimination in the conditions of work afforded to her, contrary to s 15 and that the Commonwealth was vicarious liable under s 18A. Section 9(1), (2) prohibits racial discrimination in terms that are different from most other anti-discrimination laws. It provides:

> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
>
> (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

The "Convention" is the *International Convention on the Elimination of All Forms of Racial Discrimination*, and Art 5(e)(i) refers relevantly to "[t]he rights to work, to free choice of employment, to just and favourable conditions of work". Section 15 also deals specifically with discrimination in the workplace, and makes discrimination "by reason of" race unlawful including in the terms of employment and conditions of work.

Section 9 is unusual in the context of anti-discrimination legislation: subs (1) is drawn directly from Art 1.1 of the Convention and does not contain the usual two-pronged test for direct and indirect discrimination used in other anti-discrimination legislation.[3] Instead, establishing unlawful discrimination under s 9(1) requires proof of the following five elements:[4] (i) that a person, (ii) does any act, (iii) involving a distinction, exclusion, restriction or preference, (iv) based on race, colour, descent or national or ethnic origin, (v) which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or other field of public life.

"Based on" in s 9(1) has been interpreted differently to like terms in other anti-discrimination legislation (such as "by reason of", which appears in s 15 of the Act or "on the ground of"). Rather than there being a "causal nexus", the necessary relationship is a broader one of "sufficient connection".[5] While these differences should make it easier to prove race-based discrimination, historically it has been difficult for complainants to succeed in these claims.[6]

Finally, like other anti-discrimination provisions, the provision is not confined to circumstances where there is an improper motive; there is no requirement to prove any intention or motivation to discriminate.[7] Where an act is done for two or more reasons, and one of those reasons is race etc, by s 18, the act will be taken to be done for that (unlawful) purpose even if that purpose was not the dominant or substantial reason.

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[3] Compare discrimination on the grounds of sex or age: *Sex Discrimination Act 1984* (Cth), s 5; *Age Discrimination Act 2004* (Cth), s 13. See Neil Rees et al, *Australian Anti-Discrimination Law* (Federation Press: 2014) 75: which notes: here are two elements to the standard definition of direct discrimination: first that a complainant was treated less favourably by the respondent than the way the respondent treated, or would have treated, a person of a different sex (or age) in the same, or similar circumstances; secondly, that the reason for the less favourable treatment was the complainant's sex (or age).

[4] *Australian Medical Council v Wilson* (1996) 68 FCR 46, 73 (Sackville J). The Full Court rolled the first three elements into one: *Vata-Meyer v Commonwealth* [2015] FCAFC 139, [58]-[60].

[5] *Macedonian Teachers' Association of Victoria Inc v HREOC* (1998) 91 FCR 8, 39 (Weinberg J) (upheld on appeal by Full Court in *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47). Weinberg J's approach to the meaning of "based on" was also followed in *Bropho v Western Australia* (2008) 169 FCR 59.

[6] See Jonathan Hunyor, "Skin-Deep: Proof and Inferences of Racial Discrimination in Employment" (2003) 25 Syd LR 535.

[7] *Macedonian Teachers' Association of Victoria Inc v HREOC* (1998) 91 FCR 8, 39. See also *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74.

FEDERAL CIRCUIT COURT

The FCC dismissed the performance and employment related claims on the basis that the actions taken were part of the ordinary administration of the Department and there was no connection to race:[8] "no inference is available that the Department's actions disadvantaged Ms Vata-Meyer because of her race". The appellant did not pursue those claims in the Full Court.

More surprising was the FCC's dismissal of the claims relating to Lee's comments. Lee did not deny that he had made the comments about "black babies" and "Coon cheese", although he contested the purpose and context of the remarks. The FCC also recognised, correctly, following an earlier Full Court decision,[9] that racist remarks could, depending on the circumstances, amount to an act for the purposes of s 9(1). The predominant question was whether the impugned acts involved a distinction "based on" race and whether they had "the purpose or effect of nullifying" the appellant's work rights for the purposes of s 9(1).

In addressing these matters, the judge correctly noted that the appellant must establish a connection between "the impugned acts and her race", and recognised that "unintended" remarks may impair a person's enjoyment of her right to work and to just and favourable conditions of work.[10] More problematically, his Honour said that Vata-Meyer would be unable to establish the requisite connection if there were "innocent explanations" for the comments. Indeed, as the Full Court later noted ([72]-[74]), this creates a problem of proof. It also fails to properly engage with s 18 which contemplates that there may be more than one reason for an act.

In respect of the "black babies" comments, the primary judge said that "the act of inviting an Aboriginal person to eat 'black babies'" was likely to cause offence, or to offend an Aboriginal person and it was "plain" from the evidence that Vata-Meyer was offended. His Honour regarded the comment about "Coon" cheese differently. This was because it was a recognised brand of cheese and there was no necessary connection with race (and only one of several meanings was racially pejorative). However, in neither case was it clear how his Honour's views aligned with the elements in s 9(1). Neither appeared to be a clear finding about whether Lee's remarks were a distinction "based on race" or whether they had the requisite purpose or effect of impairing the appellant's rights. Again, there was also no mention of s 18 and the need for only one reason to be race related. In relation to the claim about "Michael Jackson", aside from noting the claim, and Lee's denial that he had used that term at all, the primary judge made no further reference to the claim.

Instead, his Honour turned to Lee's "purpose" in making the comments, and said he found Lee to be "remarkably unsophisticated", and that it was possible that he "simply did not understand" the offensiveness of his remarks, and as such he was "willing to give him the benefit of the doubt on the basis that he is simply obtuse".[11] Without saying as much, this may have been what his Honour saw as an "innocent explanation" or an excuse for his poor behaviour. Again, it is not clear how his Honour's comments or findings aligned with the terms of s 9(1).

In conclusion, the primary judge held that if the "investigation and resolution of Vata-Meyer's complaint was adequate to the circumstances", Lee's comments would not have impaired her rights. On the facts, he found that the Department's actions in response to the complaint were "reasonable and adequate to the circumstances": the Department had acted promptly in its investigation of the complaint and Lee had been counselled about his remarks, had apologised and shown "genuine remorse" once their offensive nature was explained to him. As such, the primary judge held that the

[8] *Vata-Meyer v Commonwealth* [2014] FCCA 463, [78].

[9] *Qantas Airways v Gama* (2008) 167 FCR 537.

[10] *Vata-Meyer v Commonwealth* [2014] FCCA 463, [64], [69]. See *Macedonian Teachers' Association (Vic) Inc v HREOC* (1998) 91 FCR 8, 39 (Weinberg J).

[11] *Vata-Meyer v Commonwealth* [2014] FCCA 463, [67]-[68].

response: "should have ensured that Ms Vata-Meyer was not injured in the enjoyment of her work and in enjoying the fair conditions of work as a consequence of the action of Mr Lee".[12]

APPEAL IN THE FULL COURT OF THE FEDERAL COURT

The focus of Vata-Meyer's appeal was the primary judge's findings in respect of Lee's conduct and whether that conduct constituted unlawful discrimination contrary to s 9. She successfully used administrative law arguments to demonstrate error by the FCC. Thus, she argued that in failing to find that the reference to "coon" was racially pejorative, the primary judge's finding was wrong because it "failed to take into account relevant considerations", namely the context in which the word was used. This context included the fact that the comment came after his remarks about "black babies", that as the WHS advisor Lee knew about the requisite work standards and, moreover, as part of his WHS role, had recently completed training about Indigenous issues ([42]). She argued also that the Department's investigation was not relevant to determining whether the comments about "black babies" constituted a breach of s 9 as it did not remove the impairment of her rights which had already occurred. Further, if the court were to find the investigation to be relevant, then his Honour's fact finding exercise was wrong: the FCC's conclusion that the complaint was managed appropriately ignored her evidence about what happened and took account only of Lee's subjective views ([43]-[44]). Finally she argued that she was denied procedural fairness in the hearing before the primary judge when as an unrepresented litigant he had not permitted her to complete her submission before rejecting her version of events ([46]).

The Full Court allowed the appeal and in essence, agreed with Vata-Meyer's arguments, although it framed its conclusions in different language. It set aside the FCC's orders and remitted the matter to the FCC for retrial in respect of Lee's conduct on 28 September 2011 only. It was particularly critical of the FCC's findings (and lack thereof) in light of the evidence before it and its approach to s 9(1). I mention three matters raised by the Full Court.

First, it was wrong for the primary judge to say that Vata-Meyer could not establish the necessary connection between Lee's comments and her race if there were "innocent explanations". This was a question of proof and the Full Court said that the appellant was not required to "prove her case beyond reasonable doubt. The mere availability of one or more innocent explanations does not mean that Mr Lee's purpose was not an unlawful one" ([72], [74]). Rather, the Full Court said the question of being "based on" or having "sufficient connection" with race is to be determined on the balance of probabilities and having regard to the surrounding circumstances. Applied here, it could not be said that because Lee did not intend, or understand, the effects of his remarks, therefore the remarks were not based on race, in the requisite sense,[13] or did not have the requisite purpose or effect.

Secondly, and in any event, the finding that Lee did not understand the offensiveness of his comments was problematic. First, in terms of its engagement with s 9(1) the Full Court asked ([71]): was this a finding that the comments were not a distinction "based on" race, or did it mean that there was no nullifying purpose or effect? On balance, the Full Court considered it was a finding as to the latter. Even so, the finding was of concern because it was based on an impression of Lee obtained during a single short exchange with the Bench while Lee was in the witness box. There was also other evidence to which the primary judge had no regard but which tended to undermine this impression. In view of the surrounding circumstances or context in which Lee's remarks were made, the Full Court doubted it could really be said that they had no nullifying purpose or effect. Those circumstances included Vata-Meyer's angry response to the first "black babies" comment, Lee's knowledge that she was angry and his subsequent repeat of the same comments, that he knew that the word "coon" could be used as a racial slur, that the Commonwealth had a diversity and cultural sensitivity policy, and very significantly, that he was a WHS advisor who had recently undertaken cultural awareness training involving relations and attitudes between Indigenous and non-Indigenous peoples. This latter point, as the Full Court said, was a "circumstance his Honour appears to have overlooked entirely" ([82]).

[12] *Vata-Meyer v Commonwealth* [2014] FCCA 463, [77]

[13] *Macedonian Teachers' Association (Vic) Inc v HREOC* (1998) 91 FCR 8.

Thus, the primary judge gave too much weight to its impression of Lee in the witness box and failed to assess his credibility in light of all of the evidence ([88]).

Thirdly, the Full Court said ([89]-[90]) that the primary judge was wrong to hold that an adequate investigation and resolution of complaints would mean that there could be no impairment of rights: there is no "necessary reason why the steps taken to investigate and determine [a] complaint would deprive the offending conduct of its discriminatory effect" ([92]). Indeed, the primary judge's finding that the Department's response *should have* ensured that Vata-Meyer was not injured did not resolve the question about whether she was in fact so injured ([94]). They are separate matters. While the Full Court did not need to determine the matter, it would seem that the Department's handling of the complaint may become relevant to a claim of vicarious liability under s 18A of the Act, and to the question of whether it took steps to prevent Lee from doing the act (see s 18A(2)).

COMMENT

Proving racial discrimination is notoriously difficult, and few cases succeed.[14] In this case, however, the impugned comments were overt, repeated, predominantly uncontested, and contained strong racial overtones. They were also made in the Commonwealth public service, which had a policy on diversity and cultural sensitivity, by a WHS advisor trained in cultural awareness and Indigenous issues. Vata-Meyer should have succeeded at first instance.[15]

The Commonwealth, as employer, has onerous obligations under work health and safety legislation to ensure a safe workplace and had invested him with the responsibility to discharge those obligations.[16] As the advisor charged with those responsibilities, and in the context of what he knew (including that Vata-Meyer was Indigenous, that the word "coon" could be used as a racial slur, and that she was angry and offended after his first comment), Lee arguably should have been taken to have been aware of the underlying racial implications, and the harmfulness of the comments he made.[17] Alternatively, there was enough material before the court that enabled it to draw an inference that the comments were "based on" race and had the requisite unlawful purpose as required by s 9. This was not a case of "deliberate" discrimination, or one where fraud or impropriety was raised, thus requiring the more stringent *Briginshaw* test.[18] The only question was whether, relevantly, ss 9 and 15 were breached. Vata-Meyer's loss in the FCC had less to do with the quality of the evidence before that court than the confused and fundamentally wrong approach of the primary judge to the evidence and the legislation.

The primary judge's skewed findings in favour of Lee (that he was "obtuse" or too stupid to understand the offensiveness of his own remarks) and his Honour's focus on the reasonableness of the Department's investigation as a way to deprive Lee's conduct of its discriminatory effect was not only erroneous, it demonstrates the lengths to which the trial judge went to avoid finding liability. In light of the evidence before the court, it reveals a profound judicial discomfort about making findings of

[14] See Hunyor, n 7.

[15] Compare eg, *Department of Health v Arumugum* [1988] VR 319 which involved a complaint of racial discrimination by a doctor seeking to obtain a senior medical appointment with the Department. There was no direct evidence of discrimination, and he argued that was the best person qualified for the role and that the court ought to drawn an inference that race was the only reason he was not appointed.

[16] For example, *Work Health and Safety Act 2011* (Cth).

[17] Compare *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, which was an appeal on sentence in a work health and safety prosecution following a guilty plea by the company for breach of the *Occupational Health and Safety Act 1985* (Vic). The respondent company submitted that the seriousness of the company's breach was mitigated by the fact that the breach was caused by the very person charged with ensuring that the safety management system was carried out, ie, responsibilities and obligations under that Act. The Court of Appeal was unimpressed, and said "when the employee in question is the person with supervisory responsibilities, including responsibility for ensuring safety at the site, the gravity of the company's breach is increased, not reduced" ([43]).

[18] See comments in *Victoria v Macedonian Teachers' Association* (1999) 91 FCR 47, 50-51; cf *Department of Health v Arumugum* [1988] VR 319, which required for its determination a finding of "deliberate" discrimination against one section of the community in favour of another.

racial discrimination and the underlying invisibility of white privilege. Indeed, there is some truth to Vata-Meyer's cry in her final submissions to the primary judge: "a white person will never get it" ([96]).

I am heartened by the Full Court's comments suggesting that court "got it" or at least went some way to understand what Vata-Meyer was trying to say about her experience of discrimination in the public service. For example, its comment (at [84]):

> it is difficult to believe that in 2011 a person who had completed training of this nature would be oblivious to the hurt that might be caused to an indigenous person by inviting her or other employees within her hearing to eat "black babies" and would not know that it would impair her enjoyment on an equal footing of her right to just and favourable conditions of work.

It is hoped that the judge on re-trial will build on the Full Court's advice, and at least address the requirements of s 9(1) in a clear and methodical way. If that is done, then there is at least some prospect that the judge on re-trial will "get it".

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