

# COURT DECISIONS

## ZERO TOLERANCE FOR RACIAL ABUSE

Fair Work Australia (FWA) has ruled that NSW-based logistics company BAE was entitled to dismiss an employee who called another employee a 'nigger'.

The incident occurred on Friday 4 March 2011 when employee Mr Seaman overheard his colleague, Mr Saba telling others he had entered data into the system incorrectly.

This angered Mr Seaman because, as the employee with more responsibility, he was the one who had to answer to his superior if there were any computer input mistakes.

Mr Seaman then lent over to Mr Saba, who is of Italian and Maltese heritage, and called him a 'f..... nigger'.

Mr Saba asked Mr Seaman to repeat what he said and when he did, Mr Saba walked away in anger.

The following Monday the Warehouse Supervisor asked Mr Seaman to write a statement about what had happened, which he wrote and submitted straight away.

Three days later he was called to the Warehouse Supervisor's office where Mr Seaman was told that other employees had made statements and was invited to tell his side of the story, which he did.

He was dismissed immediately, however he was given four weeks pay in lieu of notice.

In his statement Mr Seaman maintains that he apologised to Mr Saba when he could see that he was angry, that but Mr Saba did not accept the apology.

He also mentioned that he was under a lot of stress because he had been suffering headaches.

He went on to say that he had undertaken training on BAE's Code of Conduct, but at the time that he used the term to Mr Saba, Mr Seaman did not know that 'nigger' was derogatory or 'an ethnic racial slur'.

Both the Warehouse Supervisor and HR Manager at BAE said there was a zero tolerance policy towards racial slurs. FWA Commissioner Roberts said there were no procedural flaws in the process, and noted there was nothing in Mr Seaman's personal circumstances that led the Commissioner to believe the dismissal was too harsh.

"In the end, Mr Seaman must accept responsibility for his actions and understand that he alone is responsible for the situation he has found himself in," he said.

Seaman v BAE Systems Australia Logistics Pty Limited [2011] FWA 7005 (4 November 2011)

## \$82K FOR DISABILITY DISCRIMINATION IN US

US global food distributing company Sysco paid its former employee Amanda Thompson \$82,000 compensation after it dismissed her upon discovering she had a disability.

The company learnt of Ms Thompson's disability when she was observed parking in a disabled parking bay.

Sysco then confronted Ms Thompson and demanded that she disclose her disability, provide supporting medical records and a physician's written advice that she was 100 per cent able to perform her job without restrictions.

She was given a deadline to provide these documents and was told that failure to do so would result in her dismissal, however Sysco fired Ms Thompson before the deadline.

The US Equal Employment Opportunity Commission filed a disability discrimination lawsuit on Ms Thompson's behalf stating that she was subjected to unlawful medical inquiries, demands and ultimately termination on the basis of her disability according to the *Americans With Disabilities Act*.

The *Americans With Disabilities Act* discrimination includes:

- limiting, segregating or classifying an employee in a way that adversely affect the opportunities of that employee
- utilising standards, criteria or methods of administration that have the effect of discrimination on the basis of disability
- failing to make reasonable accommodation with regards to disability unless doing so would impose undue hardship on an employer.

Sysco agreed to settle the matter. The consent decree settling the matter (which must be approved by the Federal Court) includes the payment of \$82,000, revision of the company's antidiscrimination policies and provision of training to staff.

### In Western Australia

In WA an employer cannot put in place a requirement that all employees be '100 per cent able to work'. The *Equal Opportunity Act 1984* places duty on employers to make reasonable adjustments to avoid discrimination. However, it may not be unlawful to discriminate against a person with disability if they are not able to perform the inherent requirements of the employment, even if reasonable adjustments are made.

The largest amount payable through WA's State Administrative Tribunal is \$40,000.



WESTERN AUSTRALIA

# Discrimination Matters



## Tackling homophobic bullying in schools

The EOC held a breakfast forum on 16 December 2011 to officially mark a collaborative project to address gender and sexuality based bullying in schools.

In 2010 the EOC consulted with a range of stakeholders in relation to concerns about this type of bullying in schools.

This resulted in the establishment of a Working Group and Steering Committee comprising senior representatives of state government education and health agencies, as well as independent and catholic schools and advocacy groups for the gay, lesbian, bisexual, transgender and intersex (GLBTI) community.

Published author in education policy and researcher in the area of sex health and society at La Trobe University Tiffany Jones came to speak to the Working Group and Steering Committee who attended the breakfast.

WA Equal Opportunity Commissioner Yvonne Henderson said Ms Jones' research in the area of homophobic bullying was both compelling and disturbing.

"The research showed that 61 per cent of young people reported verbal abuse because of homophobia, 18 per cent report physical violence and 69 per cent reported other forms of homophobia including exclusion and rumours.

"Of those surveyed who were abused, 80 per cent said school was where the abuse took place," Ms Henderson said.

The audience found Ms Jones' presentation so beneficial, the EOC has agreed to host another forum for principals, school teachers, health workers and the GLBTI community.

The morning tea forum will also include 2011 Western Australian of the Year Donna Cross and cofounder of Safe Schools Coalition Victoria Roz Ward.

It will be held on 16 March 2012, from 10am to 11.30am at the Atrium Theatre in Perth.

"Ms Jones' research has shown that specific strategies need to be put in place for homophobic bullying, which is often the most common form of bullying at schools.

"So this forum is aimed at giving the audience the knowledge to form those important strategies," Ms Henderson said.



(From Left) Yvonne Henderson, Tiffany Jones & Executive Director of WA AIDS Council Trish Langdon



## From the COMMISSIONER

In the lead up to Australia Day this year there was much talk about nationalistic pride and many chose to express this Australian pride by donning the flag or by using it to decorate some of their most prized possessions such as their car or home.

To see these people reveling in the national holiday and outwardly expressing their love of our sunburnt country you could be fooled into thinking that they loved all things Australian and everything about this county, yet you could be wrong.

Sadly recent research from UWA has shown that those flying flags on their car were more likely to agree with the White Australia Policy, that Australian culture and its most important values were in danger, that Australians should be Christian.

They were also less likely to feel positive towards minority groups including Aboriginals.

Australia's history has been built on immigration, first starting with Aboriginal people who settled here and established the nation's first culture and way of life.

Since then there have been colonists, refugees, skilled migrants, short term visa holders, people who want a change in climate or who have come to join family: all from different countries, cultures and creeds contributing to Australia and calling it home.

Many of us wouldn't be here today if it wasn't for the fact that generations of people have been able to build a new life in this country.

So when next you show Australian pride, why not be proud of everything Australian which is Aboriginal, European, African, Middle Eastern, Asian, American, British, Irish and any other race or nationality that has chosen to settle here along with you.

**Yvonne Henderson**  
COMMISSIONER



## EOC gives women a sporting chance for IWD

This year the EOC's International Women's Day breakfast will take on a sporting flavour with speakers Olympic Gold Medalist for Sailing Tessa Parkinson and anti-violence against women in sport advocate Nina Funnell.

The breakfast will be held at the Pan Pacific Hotel on Adelaide Terrace from 7.30am to 9am on 8 March.

"Sport plays such a big part in the lives of many West Australians so it is important that it is inclusive and fair for women as well as men," Equal Opportunity Commissioner Yvonne Henderson said.

"Both our speakers this year are inspirational because they have overcome struggles as women to succeed in their chosen areas," she said.

If you would like to attend this year's IWD breakfast please register and pay online at the Try Booking website using the link <http://www.trybooking.com/19469>.

For further details or to pay by cash or cheque please contact Sarah Johnston on (08) 9216 3911 or [sarah.johnston@eoc.wa.gov.au](mailto:sarah.johnston@eoc.wa.gov.au).

## Survey shows Aboriginal disadvantage is a big human rights issue for WA

One third of participants in the EOC's Human Rights survey thought Aboriginal disadvantage was WA's biggest human rights issue.

This was followed by the 20.7 per cent of participants who thought the treatment of refugees and asylum seekers was the state's biggest issue.

The online survey was launched on 10 December to coincide with Human Rights Day last year.

Participants were asked what they thought WA's biggest human rights issue was and what they would do about it.

WA Equal Opportunity Commissioner Yvonne Henderson said participants who thought Aboriginal disadvantage was the biggest issue said education was the key to solving the problem.

"Many said improved education for Aboriginal people and more education about Aboriginal culture and history for non-Aboriginal people would help bridge the gap.

"However many also said involving Aboriginal people in decision making processes would help solve the problem," Ms Henderson said.

Participants were asked if they lived in Western Australia and what age demographic they belonged to.

"Sixty one per cent were aged between 40 and 65 and only seven of the 253 participants were from outside WA," Ms Henderson said.

## Complaint SNIPPETS

**An employee in the retail sector, who was working with her mother at the same store, alleged family status discrimination when she was asked by her employer to transfer to a different store location because a new company policy did not allow her to work with her mother. The complainant alleged that she was unable to travel to the different store location and therefore sought employment elsewhere. The complaint was resolved through conciliation when the complainant received \$2000.**

**An employee of a club alleged she had been discriminated against when she was dismissed from her employment after her employer became aware of her previous spent conviction. The employer acknowledged their decision to dismiss the woman was not appropriate and agreed to pay the employee compensation of \$3,500, amend policies and provide appropriate EO training.**

**An employee alleged that her employer had not dealt properly with her complaints of sexual harassment by her supervisor. The employer agreed to provide a letter of regret to the employee, meet the cost of counseling sessions, reaccredit any leave taken due to the harassment and ensure that any inappropriate references are deleted from her personal file. It also agreed to EO training for staff, pay an amount of \$10,000 compensation and take disciplinary action against the harasser.**



## EOC complaint seen as double-dipping

The Federal Magistrates Court has issued an injunction preventing a woman from pursuing a sexual harassment, sex discrimination and age discrimination complaint at the EOC at the same time as an unfair dismissal application with *Fair Work Australia (FWA)*.

"Federal Magistrate Lucev found that the woman was making multiple applications seeking remedy for the same injury in different jurisdictions, which can't be done under s725 of the Fair Work Act," WA Equal Opportunity Yvonne Henderson said.

The woman put in an application to FWA following her dismissal from Wesco Electrics after she complained about the sexual harassment and discriminatory treatment she received at the hands of her employer Wesco Electrics.

After she lodged this application, she lodged a sexual harassment, sex discrimination and age discrimination complaint with the EOC against the company and her manager Mr Michael Mannion.

Ms Henderson said in her complaint the woman said she had been subjected to sexually harassing behaviour such as being asked to pull her top down to expose her cleavage, having emails of a sexual nature sent to other staff members from her email account and Mr Mannion urinating in front of her.

"The behaviour mentioned in this woman's complaint was appalling, however as she had already chosen to seek remedy for being unfairly dismissed for not putting up with this behaviour it can be seen as double-dipping," she said.

The woman has withdrawn her complaint from the EOC and will continue to pursue her unfair dismissal complaint.

Ms Henderson said an applicant only had 14 days to lodge an unfair dismissal complaint with FWA, however a person could lodge a complaint with the EOC up to one year after an incident of discrimination has occurred.

She said because of this finding people needed to think carefully about where they should lodge a complaint or application.

"Once a matter has been resolved in one jurisdiction it can be very hard to have it heard in another one," she said.

*Birch v Wesco Electrics (1996) Pty Ltd [2012] FMCA 5*

## EOC Champions

TAFE Institutes of Technology across the state enrolled in 26 EOC courses throughout 2011.

"As part of the course we review existing policies and procedures which helps with the roll out of new policies across the organisation," Community Education Manager Christine Johnson said.

Durack Institute Senior Human Resources Officer Christine Maddison completed the EO Law, EO for Managers

and Supervisors and Contact and Grievance Officer training courses in November last year.

"Equal Opportunity can scare people because it's often associated with headlines about what has been done poorly.

"However this course is an opportunity to expose managers and employees to what can be done right, provide the tools and inspiration to start their journey into EO," Ms Maddison said.