Australian Human Rights Commission

AG v Commonwealth (Department of Foreign Affairs and Trade) and Finite Group APAC Pty Ltd

[2018] AusHRC 123

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Report into discrimination in employment on the basis of criminal record

Australian Human Rights Commission 2018

Australian
Human Rights
Commission

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Commission

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my inquiry pursuant to section 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of discrimination in employment on the basis of criminal record made by Mr AG against the Commonwealth (Department of Foreign Affairs and Trade) (DFAT) and Finite Group APAC Pty Ltd (Finite).

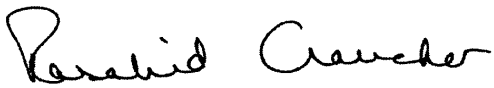
I have found that DFAT's encouragement of Finite to withdraw Mr AG's services from DFAT constituted an exclusion based on his criminal record. Such an exclusion had the effect of impairing Mr AG's equality of opportunity or treatment in employment or occupation. I found that this exclusion was not based on the inherent requirements of the job. As a result, I found that DFAT discriminated against Mr AG on the basis of his criminal record.

In light of my findings, I recommended that DFAT pay Mr AG an amount in compensation for loss of earnings due to his exclusion from employment with DFAT and pay Mr AG compensation reflecting the hurt, humiliation and distress experienced by him as a result of DFAT's conduct.

DFAT has provided its response to my findings and recommendations on 3 and 13 April 2018. I have set out DFAT's response in Part 7 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

April 2018

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr AG against the Commonwealth of Australia (Department of Foreign Affairs and Trade) (DFAT) and Finite Group APAC Pty Ltd trading as Finite IT Recruitment Solutions (Finite), alleging discrimination in employment on the basis of his criminal record.

2. Division 4 of Part II of the *Australian Human Rights Commission 1986* (Cth) (AHRC Act) confers functions on the Commission in relation to equal opportunity in employment. Section 31(b) of the AHRC Act empowers the Commission to inquire into any act or practice, which may constitute discrimination. This includes the making of a distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment.

3. Mr AG has asked for a direction pursuant to s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this complaint. I have made a direction to that effect that is limited to the parties to this complaint and I have used the pseudonym 'Mr AG' throughout this report. I note that aspects of the complaint by Mr AG are already in the public domain. It is necessary to refer to some of that public information in the course of these reasons. The direction I have made does not prevent members of the public from discussing matters that are already part of the public domain. Nor does it prevent a person from communicating to a second person a matter contained in information or documents produced to the Commission if the first person has knowledge of the matter otherwise than by reason of the information or documents having been produced to the Commission.

4. Having considered all of the material before the Commission in this matter, I find that DFAT encouraged Finite to withdraw Mr AG's services from DFAT, that this was an exclusion based on Mr AG's criminal record, that it impaired Mr AG's equality of opportunity or treatment in employment, and that it was not based on the inherent requirements of the particular role of SOE Specialist.

5. I find that Finite agreed to the termination of Mr AG's services because it formed the view that this is what DFAT wanted and that DFAT had the ability to terminate the employment of Mr AG on short notice (5 business days). I find that Finite did not seek to withdraw Mr AG's services from DFAT because it had separately and independently formed the view that Mr AG's criminal record, or his alleged failure to notify his change of circumstances, meant that he should no longer continue to work at DFAT.

6. I find that DFAT's act constitutes discrimination within the meaning of sections 3 and 31(b) of the AHRC Act. In accordance with s 35(2)(c) of the AHRC Act, I recommend that DFAT pay compensation to Mr AG to remedy the loss he has incurred as a result of this discrimination. I deal with the question of compensation in section 6 below.

2 Background

2.1 Employment

7. Mr AG commenced work with DFAT on 29 February 2016 on a one year contract as a Standard Operating Environment (SOE) Specialist. He worked in DFAT's Information Management and Technology Division (IMD).

8. Formally, it appears that Mr AG was directly employed by a payroll company called By Jingo Business Services Pty Ltd (By Jingo). Mr AG, Finite and By Jingo signed a tripartite contract on 15 February 2016 (and on 7 March 2016 in the case of By Jingo). Pursuant to that contract, By Jingo agreed to provide the services of Mr AG at the direction of Finite to DFAT. By Jingo acknowledged in that agreement that Finite had contracted with DFAT to supply the services of Mr AG. The contract provided that Finite may terminate the contract at any time by notice in writing to By Jingo in a number of circumstances, including if DFAT requires Mr AG's services to be terminated in accordance with the contract between Finite and DFAT.

9. Mr AG's services were provided to DFAT by Finite pursuant to a Deed of Standing Offer for the Provision of ICT Contractor Services between the Commonwealth and Finite. That Deed provided that Finite would provide these services to the Commonwealth when a Work Order was signed by both parties. A work order was signed by DFAT and Finite on 2 February 2016 for the supply of ICT Contractor Services to DFAT by Mr AG from 1 March 2016 to 28 February 2017 with the option for this period to be extended twice for 12 months each if required by DFAT. There was a trial period of 1 month. The work order provided that:

> DFAT may terminate a work order by giving the service provider 5 business days written notice. Should the service provider terminate the work order, 30 days' notice is required. If a work order is so terminated, DFAT is only liable for payment of specified personnel services rendered before the effective date of termination.

10. Schedule 10 of the Deed of Standing Offer contained general terms and conditions applicable to all contracts entered into under the Deed. Pursuant to these terms and conditions, the Commonwealth also had a range of other rights to terminate any given contract or reduce the scope of its services. There were no additional rights in Schedule 10 for the Vendor (here, Finite) to terminate a contract.

11. Mr AG was required to hold a security clearance of NVL1 (Negative Vetting Level 1) with the ability to obtain a security clearance of NVL2 (Negative Vetting Level 2) to work in the position with DFAT. He held a security clearance of NVL2 as a result of previous employment with another Commonwealth agency.

12. Mr AG says that he considers that DFAT was his actual employer. He says that DFAT interviewed him for the role, selected him for the position, directed all aspects of his work and approved his timesheets. DFAT claims that Mr AG was employed by Finite. Finite claims that Mr AG was employed by By Jingo.

13. I accept that, as a matter of form, Mr AG was employed by By Jingo. However, By Jingo did not have any involvement in the day to day activities of Mr AG. Finite procured the employment of Mr AG for DFAT. It provided Mr AG's services to DFAT pursuant to the Deed of Standing Offer and received a fee for this service. Finite also received fees for the placement of more than a hundred other contractors with the Commonwealth and the Commonwealth was an important client of Finite. However, again, Finite was not directly involved in Mr AG's day to day activities. Mr AG provided his labour to DFAT, he was directly supervised by other employees of DFAT and he was ultimately paid by DFAT. DFAT was responsible for the day to day activities of Mr AG and it could be expected that DFAT would have the primary interest in whether Mr AG's employment as an SOE Specialist at DFAT continued.

2.2 Criminal charges

14. Mr AG says that on 4 March 2016 he was served with a summons to appear in the ACT Magistrates Court. He attended court on 17 March 2016 and 7 April 2016 and pleaded guilty to two charges:

    - endangering the life of a domestic animal or bird pursuant to s 385 of the *Crimes Act 1900* (ACT) (Crimes Act)

    - damaging property, pursuant to s 116(3) of the Crimes Act.

15. Mr AG's conduct involved throwing a packet of 'ratsak' over a fence into his neighbour's backyard at 2.30am after being woken by the barking of his neighbour's dog, and throwing a one litre tin of white house paint at the dog which missed and spread across the roof of the dog shelter.

16. In the course of sentencing, the Magistrate noted that the morning after the incident Mr AG attended a local police station and made a full admission to the offences. The Magistrate was satisfied that Mr AG's conduct 'falls at the lower end of the scale of objective seriousness'.

17. The Magistrate made a 'non-conviction order' under s 17 of the *Crimes (Sentencing) Act 2005* (ACT) (Sentencing Act). The form of this non-conviction order was a 'good behaviour order' under s 13 of the Sentencing Act. One effect of this order being made was that Mr AG was not convicted of either offence. The good behaviour order required Mr AG to sign an undertaking to comply with good behaviour obligations under the *Crimes (Sentence Administration) Act 2005* (ACT) and to be on good behaviour for a period of 12 months.

18. The Magistrate also made a reparation order, requiring Mr AG to pay $330.53 to his neighbour in compensation for property damage to the fence and the cost of the dog attending a veterinary clinic. Blood tests on the dog returned a negative reading.

2.3 Cessation of employment

19. Mr AG's sentencing hearing took place on Thursday, 7 April 2016. Later that day, a newspaper article was published about the outcome of the hearing. The article mentioned that Mr AG worked at DFAT.

(a) Response by DFAT to media article

20. On Friday, 8 April 2016, the article appeared in DFAT's media clips. Officers in DFAT's Parliamentary and Media Branch contacted officers in other areas of DFAT about the article, including officers in IMD and in the Management, Conduct and Corporate Strategy Section (MCS).

21. Among others, Mr Gary Williams, Investigations Manager in DFAT's Conduct and Ethics Unit in MCS, was made aware of the article. DFAT says that Mr Williams called a number of different officers in IMD, where Mr AG worked, in order to 'confirm [Mr AG]'s status and position' and to 'assess whether security requirements of the Department had been satisfied'. DFAT says that Mr Williams was told that:

    - Mr AG was a contractor performing work at DFAT under a commercial agreement with Finite.
    - Mr AG had not reported to DFAT the fact that he had been charged with an offence, which was a 'change of circumstances' relevant to his security clearance.

22. DFAT says that 'IMD identified that … it would be appropriate to draw Finite's attention to the article'. DFAT does not say who identified or decided that this would be appropriate. DFAT claims that DFAT officers did not have a view about whether Mr AG's engagement should continue after becoming aware of his criminal record.

23. Mr Williams then called the Chief Information Officer, Mr Tim Spackman, and advised him of the article and Mr AG's status as a contractor provided by Finite. DFAT says that no notes were made of this telephone conversation.

24. Mr Spackman called Ms Katie Bedington, a Senior Consultant at Finite. DFAT's account of this conversation contains little detail about what was said by Mr Spackman. That account is as follows:

> On 8 April, Mr Spackman spoke with Ms Katie Beddington, Senior Consultant of Finite alerting her to the media article about [Mr AG]. Ms Beddington advised that [Mr AG] had not informed Finite about his court proceedings, nor the outcome reported in the media. Ms Beddington indicated that she would consider what necessary action needed to be taken, discuss the issue with [Mr AG] and take any necessary action under Finite's recruitment policies and procedures.

25. In a later submission by DFAT, it put the position more strongly than merely discussing the issue with Mr AG and taking 'any necessary action'. Instead DFAT said that:

> Ms Beddington said that Finite would deal with the situation and that Finite did not want [Mr AG] working at DFAT anymore. Mr Spackman did not, either directly or indirectly, request or encourage Finite to withdraw [Mr AG]'s services from DFAT.

26. DFAT says that Mr Spackman did not make a file note of this conversation.

27. Finite says that it only became aware of Mr AG's criminal record after being informed of it by DFAT. Finite says that Mr Spackman called to advise that DFAT was 'terminating the contract between DFAT and Finite for [Mr AG]'s services'. Finite says that '[t]he decision to terminate the supply contract for [Mr AG]'s services with Finite was entirely DFAT's'. Finite denies that it had formed its own view that Mr AG was unsuitable for work or that he should not be engaged as a result of the criminal matter. Rather, it says that Finite was eager to please DFAT and to meet its needs in furtherance of the relationship between Finite and DFAT. Finite says that as at May 2017 it had 5 contractors or consultants placed with DFAT and 141 contractors or consultants placed with other Commonwealth agencies.

28. After getting off the phone with Mr Spackman, Ms Bedington sent an email to one of her colleagues at 3.08pm saying:

> So I am leaving at 4pm as I have to walk [Mr AG] off site immediately then meet with Tim Spackman (CIO from DFAT) to let him know that I have done it.

29. DFAT denies that it exercised its right to terminate the work order with Finite for Mr AG's services. It says that 'Finite withdrew [Mr AG] from the position of Specified Personnel under the Work Order on 8 April 2016'. As noted below, DFAT has not produced any records which would support the claim that Finite exercised its option to terminate the work order (with 30 days notice) as opposed to DFAT terminating the work order (on 5 days notice).

30. After speaking with Ms Bedington, Mr Spackman called Mr Darren Beauchamp, the branch head of IMD where Mr AG worked. Mr Spackman advised Mr Beauchamp of the media reports about Mr AG and of his conversation with Ms Bedington. DFAT says that there are no file notes of this conversation.

31. Mr Williams called Mr AG's director (Mr Shaun Cordell) and his team leader and immediate supervisor (Mr Michael Djula) to advise them that Mr Spackman had spoken with Finite. DFAT says that there are no file notes of these conversations.

(b) Mr AG notified that his employment is terminated

32. Mr AG claims that in the morning of 8 April 2016 he advised Mr Cordell and Mr Djula about the outcome of the court case and the good behaviour order. He claims that they told him that it should not be a problem and suggested that they discuss it the following Monday to see if anything else needed to be done in terms of reporting to relevant areas at DFAT. Mr Cordell denies having a conversation with Mr AG about this. The Commission did not receive submissions or any other documents from DFAT indicating whether or not Mr Djula's agreed that such a conversation took place.

33. Mr AG says that he had a conversation with Mr Williams at around 3.30pm. He says:

> I came back to my desk in the afternoon to find a few missed calls from Mr Williams on my desk phone. I didn't know who he was, so I looked him up on the corporate directory. I then advised my supervisor Mr Djula – he suggested I use the phone in Mr Cordell's office to return the call to Mr Williams. (Mr Cordell was not there). I did so, telling Mr Williams that I was returning his call. Mr Williams started the conversation saying "Where were you? I have been trying to call you". He then went on to advise … that he had seen the … article, and that my contract was being terminated, effective immediately. He said this was because I had been charged with a criminal offence, because of misconduct due to the criminal offence, and because I hadn't advised DFAT of the court case. He also stated that he was disgusted by my misconduct and that Mr Spackman agreed that I should be terminated immediately. He then ordered me out of the building immediately.

34. Mr AG's version of events is consistent with an email he sent on 11 April 2016, the Monday after the termination of his employment, to the Security Policy Branch of DFAT. In that email, Mr AG said:

> I was ordered out of the building by Mr Gary Williams of Corporate Division, who told me (over the phone) that my services are no longer required. (I am a Contractor). I have not as yet received any written advice from DFAT regarding the grounds for my dismissal, and I will be looking into that further, along with my solicitor.
>
> Presumably Mr Williams was angry and embarrassed (on behalf of DFAT) by the news article … regarding this case on 8.4.16. I certainly understand this, as I was also very angry and embarrassed by it.

35. Mr Williams sent an internal email on 11 April 2016, responding to the claims made by Mr AG in this email, saying:

> Just for clarification, [Mr AG] rang me on the day in question late in the afternoon, not the other way around. He was told to discuss the situation with his employer as I was informed they (FINITE) had been notified of the situation (court appearance) by IMD. His employer made the decision to remove him from DFAT as I understand it, following consultation with IMD. There was no direction from this office.
>
> Mr Spackman can verify the details of the decision to remove him from DFAT if you require it. CEU [Conduct and Ethics Unit] had no interaction with FINITE regarding this decision. Had they not taken this step, a code investigation would have certainly been commenced by the CEU pursuing a possible contractual breach for failure to abide by the Code but as the contracting agency, who provides [Mr AG] to DFAT as part of their contractual agreement, had made that decision to remove him before the CEU needed to commence an investigation, this really is a private matter between him and his employer.

36. Mr Spackman responded to this internal email saying:

> I entirely agree that this is a matter between [Mr AG] and his employer – Finite Recruitment Solutions. We DFAT or IMD did not deal with [Mr AG] directly on this at all. As is the case with our contractor workforce DFAT has a contractual relationship with an agent (in this case Finite) not the individual contractor.

37. In submissions to the Commission, Mr AG responded to an allegation by DFAT that he had been wrong in his complaint when he alleged that Mr Williams had called him, and that in fact Mr AG had initiated the call with Mr Williams. Mr AG said:

> It did not occur to me to mention that I was returning Mr Williams' calls in my original complaint, as the outcome is the same ie. Receiving advice of missed calls from Mr Williams then calling him back is the same as him calling me. I also didn't mention it as it did not occur to me that Mr Williams would later dispute having called me. It makes no sense to claim that an IT contractor who had been working at DFAT for just a few weeks would call someone they didn't even know existed, in a section they did not know existed – and a section that is primarily there to monitor APS employees, not contractors.

38. This last submission from Mr AG is persuasive. I am satisfied that Mr Williams, Investigation Manager in DFAT's Conduct and Ethics Unit, had attempted to call Mr AG. There is no dispute that prior to speaking with Mr AG, Mr Williams had called both Mr AG's director and his team leader and immediate supervisor to advise them that Mr Spackman had spoken with Finite. I am satisfied that Mr AG returned the call from Mr Williams. I do not consider that it is necessary for me to make findings about precisely what was said during the call between Mr AG and Mr Williams but I am satisfied that as a result of this call Mr AG was notified that his employment at DFAT was terminated.

(c) Mr AG leaves the office

39. Mr AG says that shortly after his conversation with Mr Williams he left the office 'feeling shocked, humiliated, anxious and depressed'. He says that his supervisor Mr Djula escorted him to the front entrance to hand his pass in. DFAT agrees that Mr Djula accompanied Mr AG from his work area to the Front Security Desk where Mr AG surrendered his pass.

40. However, DFAT says that before Mr AG left DFAT's premises, Finite called him to tell him that his employment had been terminated. Both Mr AG and Finite dispute this.

41. In an early submission DFAT said that: 'It is understood by DFAT that Mr AG was directed by Finite to leave DFAT's premises on 8 April 2016'. The Commission asked how DFAT came to that understanding. In response, DFAT said:

> In the afternoon of 8 April 2016, [Mr AG] received a telephone call from Ms Katie Beddington of Finite. After his conversation with her, [Mr AG] then handed the telephone receiver to Mr Djula ([Mr AG]'s Team Leader). Ms Beddington advised Mr Djula that she had told [Mr AG] that his services were withdrawn and that he would surrender his security pass to the Security Desk by the end of the day.

42. Mr AG disputes this description, saying:

> This never happened.
>
> My first contact from Ms Bedington that day was when I got to my car after leaving the DFAT building for the last time, and I saw a missed call from her on my mobile phone. I returned her call and she said she had been advised by DFAT that they were terminating my contract. She was very sympathetic towards me and said she had asked DFAT for reasons for my dismissal, and would let me know once she had heard back from them. My subsequent conversations with Ms Bedington on this matter were then via emails 8-12 April 2016. (Previously submitted).

43. Finite also disputes the account given by DFAT, saying:

> DFAT now claims that on 8 April 2016, Ms Bedington had a conversation with Michael Djula, and that Ms Bedington advised Mr Djula that [Mr AG]'s services had been withdrawn. Finite denies that this conversation occurred. As previously submitted, when Ms Bedington contacted [Mr AG] with the intention of advising him that his engagement at DFAT had been terminated by DFAT, [Mr AG] advised her that he had already been informed of the termination of his engagement by his manager, Mr Djula. [Mr AG] also advised Ms Bedington that he could not talk at that time as Mr Djula was in the process of walking him off site. Ms Bedington did not talk to Mr Djula at that time.

44. Finite had previously submitted:

> As it turned out, Ms Bedington did not have to walk [Mr AG] off site on the afternoon of 8 April 2016 because, when she called [Mr AG] to notify him of the termination, [Mr AG]'s manager at DFAT had already told him his engagement had been terminated and was in the process of walking him off site and ensuring the return of his security pass. Ms Bedington did not, therefore, have to execute the termination because DFAT had already done it. Another of Finite's employees at the time … was a witness to the phone exchange between [Mr AG] and Ms Bedington referred to in this paragraph.

45. Given the factual dispute about the conversation that DFAT alleges between Ms Bedington, Mr AG and Mr Djula, the Commission asked DFAT to provide a signed statement from Mr Djula setting out, in as much detail as he is able to recall, the circumstances and extent of any conversations he had with Mr AG and Ms Bedington on 8 April 2016.

46. DFAT responded to this request by declining to provide a statement. However, it reiterated the version of events it had previously put forward with some additional detail about the contents of the phone call. It said that:

> Ms Beddington introduced herself to Mr Djula on the phone (the two had never spoken before). She told him that she had been speaking to Mr Spackman earlier that day, that a decision had been made to withdraw [Mr AG]'s services, and that she had told [Mr AG] that his contract was terminated and that he had been asked to leave the building. Mr Djula agreed with Ms Beddington that he would escort [Mr AG] out of the building.

(d) Subsequent communications

47. Shortly after 7.30am on Monday, 11 April 2016, Ms Bedington sent an email to [Mr AG] saying:

> As per our discussion on Friday afternoon, DFAT have requested your contract be terminated effective as of Friday, 8th April 2016. I am waiting for an email from DFAT detailing your dismissal and shall provide this to you when I receive it. I shall follow up DFAT today to discuss this matter with them in further detail and will contact you after this conversation has happened.

48. Later that morning, Ms Bedington sent another email to Mr AG saying:

> I am still waiting for the letter from DFAT. I have left a message for Tim Spackman and will let you know when I hear back from him.

49. DFAT denies that Ms Bedington left a message for Mr Spackman in relation to providing this documentation.

50. At around 2.45pm that day, Ms Bedington sent another email to Mr AG saying: 'Please find following the termination clause that applies to contractors working within the Federal Government'. Extracted below that statement is a clause about 'termination for convenience'. The clause is different from the clause in the work order described in paragraph 9 above that allows the Commonwealth to terminate the work order for convenience with 5 days' notice. It appears that the clause in Ms Bedington's email may have been taken from a different deed with the Commonwealth.

51. Ms Bedington's email continued, saying:

> Tim Spackman (CIO of DFAT) has requested that you no longer contact anyone within DFAT to discuss this matter.
>
> Based on this clause alone, unfortunately, there is no way we can argue this termination.

52. DFAT denies that Mr Spackman made a request that Mr AG not contact anyone within DFAT to discuss his termination.

53. Finite says that it offered to assist Mr AG to find another role and started looking for a suitable position for him the same day.

3 Relevant legal framework

54. Part II, Division 4 of the AHRC Act is concerned with the Commission's functions relating to equal opportunity in employment.

55. Section 31(b) of the AHRC Act confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) requires that the function of the Commission under s 31(b) be performed by the President.

56. 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 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.

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

4 Issues for consideration

58. 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.

4.1 Is there an act or practice?

59. 'Act' and 'practice' are defined in s 30(1) of the AHRC Act. 'Act' and 'practice' have their ordinary meanings. An 'act' is a thing done and a 'practice' is a course of repeated conduct.

60. This inquiry has been difficult because many of the precise facts are in dispute. Ultimately, it is necessary for me to make a determination about whether or not I am satisfied based on the documentary material and submissions from the parties that relevant acts occurred. I have not found it necessary to make findings about all of the various factual disputes between the parties.

61. When considering the nature of administrative decision making, the use of concepts that draw too closely upon analogies in the conduct and determination of civil litigation may be misleading. As the High Court said in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*:

> Submissions were made at the hearing of the appeal as to the correct decision-making process which it would have been permissible for the delegates to adopt. These submissions were misguided. They draw too closely upon analogies in the conduct and determination of civil litigation.

> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term 'balance of probabilities' played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term 'evidence' as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.[2]

62. The test that I need to apply in determining whether there has been 'discrimination' for the purposes of the AHRC Act is whether I am of the opinion that a particular act or practice constitutes discrimination. As with other administrative powers that turn on the satisfaction or opinion of the decision maker, it is necessary that the opinion is formed reasonably on the basis of material in front of me.[3]

63. There are a number of elements to a finding of discrimination. I must be of the opinion that there was a distinction, exclusion, or preference; made on the basis of the complainant's criminal record; that had the effect of nullifying or impairing his equality of opportunity or treatment in employment; and that was not based on the inherent requirements of the job.

64. In forming an opinion as to whether any act or practice occurred and, if so, whether it amounted to discrimination, I have been guided by the well-known statement of Dixon J in *Briginshaw v Briginshaw*,[4] as explained by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[5]

65. In *Briginshaw v Briginshaw*, Dixon J said:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.[6]

66. I have had regard to the seriousness of each allegation made, the inherent unlikelihood of an occurrence of the kind alleged and the gravity of the consequences that would flow from any particular finding.

67. I have taken particular care to assess the whole of the material and all submissions provided by the parties before reaching a concluded view of the issues in dispute in this matter. I also provided the parties with a copy of my preliminary views for their comment.

68. I set out below my findings based on a review of the material and submissions provided by the parties.

69. First, I find that DFAT was concerned about the public reports of Mr AG's criminal matter and about Mr AG's conduct. The reports were published in a widely circulated newspaper. The reports prompted immediate action by DFAT's Parliamentary and Media Branch. This action included contact with officers in IMD, where Mr AG works, and MCS which includes DFAT's Conduct and Ethics Unit. I infer that DFAT considered that Mr AG's criminal matter raised issues about his compliance with his employment obligations.

70. Secondly, I find that, as a result of its concerns, DFAT intended to investigate Mr AG's conduct. This is clear from Mr Williams' later email in which he says that if Finite had not 'made that decision to remove him':

> a code investigation would have certainly been commenced by the [Conduct and Ethics Unit] pursuing a possible contractual breach for failure to abide by the Code.

71. Thirdly, I find that, prior to the call from Mr Spackman, Finite was not aware that Mr AG had been involved in a criminal proceeding. I accept the submission from Finite that Ms Bedington had read the newspaper article that morning but had not realised that it was about a person that Finite had placed with DFAT until receiving the telephone call from Mr Spackman.

72. Fourthly, I find that Mr Spackman called Finite in order to, at the least, encourage Finite to withdraw Mr AG's services from DFAT. It is possible that Mr Spackman expressed himself in stronger terms than this, for example, Finite submits that Mr Spackman called to advise that DFAT was terminating the contract for Mr AG's services. I do not consider that it is necessary to determine whether Mr Spackman expressed himself in any stronger terms. DFAT denies that Mr Spackman directly or indirectly encouraged Finite to withdraw Mr AG's services but, other than this denial, the other material available to me points strongly to the conclusion I have reached. I refer to some key aspects of that material below.

73. Fifthly, I find that Finite agreed to the termination of Mr AG's services because it formed the view that this is what DFAT wanted and that DFAT had the ability to terminate the employment of Mr AG on short notice. I find that Finite did not seek to withdraw Mr AG's services from DFAT because it had separately and independently formed the view that Mr AG's criminal record, or his alleged failure to notify his change of circumstances, meant that he should no longer continue to work at DFAT.

74. DFAT says that the only reason that Mr Spackman called Finite was to 'ask whether [Mr AG] had notified his change of circumstances to Finite'. It says that:

> At the start of the call, Ms Beddington informed Mr Spackman that she had become aware of this issue of [Mr AG's] criminal record from reading the … article prior to the call.

75. For the reasons set out above, I consider that to the extent that Ms Bedington 'informed' Mr Spackman of this, it was limited to agreeing that she had read the article that morning, but not that she had appreciated at the time of reading the article that it was about a person that Finite had placed with DFAT.

76. DFAT's account of the call continued:

> She informed Mr Spackman that [Mr AG] had not notified Finite of his change in circumstances.

77. I consider that it is likely that Mr Spackman asked Ms Bedington about whether Mr AG had notified her about the criminal case and that she answered that he had not.

78. DFAT's most recent account of the call continued:

> Following this Ms Beddington said that Finite would deal with the situation and that Finite did not want [Mr AG] working at DFAT anymore.

79. I consider that it is highly unlikely that Ms Bedington would have volunteered to 'deal with the situation' raised by Mr Spackman without, at the least, encouragement from Mr Spackman. It is inconsistent with the other available material before me that she would have done so. She clearly understood that DFAT wanted Mr AG's employment terminated.

80. In response to my preliminary view in this matter, DFAT submitted that:

> It is entirely likely that Ms Bedington would have been embarrassed to discover during the call that the newspaper report was about a contractor supplied to the Department by Finite, and would have immediately considered that this reflected poorly on Finite. It is also entirely likely that, in circumstances where Finite was motivated by its desire to preserve its commercial relationship with the Department, Ms Bedington would have volunteered to deal with the situation.

81. DFAT suggests that, as a result, it should not be inferred that there was 'any positive act of encouragement on Mr Spackman's part'. I do not consider that these submissions assist DFAT. If anything, they acknowledge the likely effect that Mr Spackman's call would have on Finite. That is, both DFAT and Finite recognise that Finite was likely to have been motivated by the desire to protect its commercial relationship with DFAT.

82. Further, contemporaneous records make clear that Ms Bedington was in no doubt that DFAT wanted Mr AG's employment to be terminated. After getting off the phone with Mr Spackman, Ms Bedington sent an email to one of her colleagues at 3.08pm saying:

> So I am leaving at 4pm as I have to walk [Mr AG] off site immediately then meet with Tim Spackman (CIO from DFAT) to let him know that I have done it.

83. Ms Bedington saw her obligations to be: first, walking Mr AG off DFAT's premises; and secondly, confirming to Mr Spackman that she had done this.

84. Despite the significance of this call with Ms Bedington, in which a decision was made to terminate the continued employment of a senior officer in Mr Spackman's team, Mr Spackman did not make a file note of this conversation. In response to my preliminary view, DFAT said that '[i]t is not surprising that Mr Spackman would not make a filenote of a conversation in which Ms Bedington advised him that she would deal with the situation (requiring no action on his part)'. I do not consider that this provides an adequate explanation. A file note would be equally useful as a record of what Ms Bedington said she would do. In the absence of any such note by Mr Spackman regarding the termination of a senior employee, the only such record is Ms Bedington's. She was clear as to what she understood the purport of the conversation to be.

85. Ms Bedington also made clear to Mr AG in an email the following Monday, 11 April 2016, that: 'As per our discussion on Friday afternoon, DFAT have requested that your contract be terminated effective as of Friday, 8th April 2016'. This is consistent with Mr AG's account of his conversation with Ms Bedington on the Friday afternoon. Mr Bedington's email on Monday made clear that she was expecting further correspondence from DFAT detailing Mr AG's dismissal. It appears that this written confirmation was not forthcoming.

86. Internal emails within DFAT sent after Mr AG's employment had been terminated and in response to complaints he had made about the nature of his termination suggested that the termination was 'a matter between [Mr AG] and his employer' (Mr Spackman) and 'a private matter between him and his employer' (Mr Williams). These emails are not inconsistent with DFAT encouraging Finite to take steps to withdraw Mr AG's services. Mr Spackman says that '[w]e DFAT or IMD did not deal with [Mr AG] directly on this at all'. Instead, Mr Spackman dealt with Finite, who dealt with Mr AG.

87. DFAT says that it did not exercise any right to terminate the supply contract of Mr AG for convenience. It says that '[h]ad DFAT exercised any right of termination under the Work Order entered into between it and Finite, it would have been required to provide written notice to Finite in accordance with the Work Order terms'. According to the work order, DFAT was required to give 5 days' written notice. However, a similar submission could be made even more strongly from the point of view of Finite. According to the work order, if Finite wanted to terminate the work order unilaterally '30 days' notice is required'. It is even more unlikely that DFAT would have permitted Finite to terminate the work order with effectively no notice unless this was a result that DFAT wanted. Finite submits that it is highly unlikely that DFAT would waive the 30 day notice period in circumstances where Finite had unilaterally decided to remove a contractor without having available a replacement to fill DFAT's ongoing requirement for an SOE Specialist. These submissions are persuasive.

88. DFAT has not produced a written notification either of DFAT exercising its right to terminate the work order (on 5 days' notice) or Finite exercising its right to terminate the work order (on 30 days' notice). It appears that Mr AG was terminated immediately without any formal notice being given, either from DFAT to Finite or from Finite to DFAT. In the circumstances, I agree with Finite's submission that Mr AG would not have been terminated immediately unless this was what DFAT wanted.

89. The Commonwealth in general and DFAT in particular was an important client of Finite. It is common ground that Finite had a particular interest in ensuring that it maintained a good relationship with DFAT. Although Finite would suffer a loss of income in the short term as a result of the work order with Mr AG being terminated (according to the work order, DFAT would not be liable for any payments after the date of termination), it appears that the longer term relationship with DFAT and the Commonwealth was more important to Finite. Finite submits that, as a service provider to the Commonwealth, it was 'eager to please DFAT and to meet its needs in furtherance of the relationship'.

90. There is a difference in the submissions of Mr AG and DFAT about how Mr AG came to know that his employment had been terminated. DFAT says that Mr Williams called Mr Djula (Mr AG's team leader) to advise that Mr Spackman had spoken with Finite. DFAT says that Mr Williams then spoke with Mr AG and advised Mr AG that he should 'discuss the situation with his employer, Finite'. DFAT says that Ms Bedington of Finite then called Mr AG to direct him to leave DFAT's premises and that DFAT knows this because Mr AG handed the receiver to Mr Djula after speaking with Ms Bedington.

91. Mr AG says that Mr Williams informed him in strong language during their phone call that his contract was being terminated, effective immediately, and that he should leave the building. Mr AG says that it was only after he left the building that he spoke with Ms Bedington. Finite says that Ms Bedington called Mr AG as he was being walked off site and that this saved Ms Bedington having to do this herself. As noted above, Ms Beddington understood after her call with Mr Spackman that she had to walk Mr AG off site and then confirm to Mr Spackman that she had done so. There is no dispute that Mr AG was walked off site by his supervisor at DFAT, Mr Djula.

92. I have not found it necessary to make findings about precisely what was said during the call between Mr AG and Mr Williams or to decide between the different accounts of when Ms Bedington spoke with Mr AG on 8 April 2016 described in section 2.3(c) above.

93. I find that the call from Mr Spackman to Finite to, at the least, encourage Finite to withdraw Mr AG's services from DFAT was an 'act' within the meaning of s 30(1) of the AHRC Act.

94. In response to my preliminary view, DFAT submitted that the Commission is 'unable to be satisfied' that an act occurred on the basis of the available material. The main objection of DFAT is that the Commission had reached a preliminary view that there was a relevant act on the basis of inferences from the documentary material, including contemporaneous records, and the written submissions provided by the parties, including descriptions of the content of the conversation between Mr Spackman and Ms Bedington. It says that the Commission has no 'direct evidence' and no 'cogent evidence' because it did not obtain statements from Mr Spackman and Ms Bedington. In carrying out an inquiry, the Commission may inform itself in such manner as it thinks fit and is not bound by the rules of evidence (AHRC Act, s 14(1)). I note that when the Commission asked DFAT to provide a statement from Mr Djula in relation to another issue in dispute (see paragraphs 45 to 46 above), DFAT declined to provide one. I do not agree that the only way in which relevant findings could be made in this matter was based on statements from Mr Spackman and Ms Bedington given the other material available to the Commission.

95. I acknowledge that there is a dispute between DFAT and Finite as to the contents of the conversation between Mr Spackman and Ms Bedington. I also acknowledge that the finding made against DFAT in paragraph 72 above is one necessarily based on inference. However, it is an inference that I am satisfied should be drawn. Ms Bedington was in no doubt following her call with Mr Spackman that DFAT wanted Mr AG's employment to be terminated. This is supported by her contemporaneous email. The circumstances in which Mr Spackman came to call Ms Bedington, and her assurance that she would (as DFAT puts it) 'deal with the situation' support the finding I have made. The agreed position that Finite was likely to have been motivated by the desire to protect its commercial relationship with DFAT supports the finding. The fact that DFAT was content for Mr AG to be terminated effective immediately also supports this finding. It is possible that Mr Spackman did more than merely encourage Finite to withdraw Mr AG's services. For example, as Finite submits, it is possible that Mr Spackman told Ms Bedington that DFAT was terminating the work order between DFAT and Finite for Mr AG's services. As noted above, it is not necessary for me to find that Mr Spackman expressed himself in any stronger terms than I have found.

4.2 Does the act involve a distinction, exclusion or preference on the basis of criminal record?

96. I find that DFAT's act in, at the least, encouraging Finite to withdraw Mr AG's services constitutes an 'exclusion' within the scope of the definition of 'discrimination' in the AHRC Act. The impact of this exclusion is considered in more detail in the next section.

97. There is no definition of what constitutes a 'criminal record' for the purposes of assessing conduct that may be discriminatory within the meaning of s 3 of the AHRC Act. The criminal record ground was inserted into the AHRC Act following recommendations made by the Australian Law Reform Commission (ALRC) in its *Spent Convictions Report*. The ALRC noted in that report that:

> There is no logical reason to limit discrimination to records of convictions. Discrimination on the basis that a person has been charged or arrested in relation to a particular offence may be just as damaging.[7]

98. This is consistent with previous reports of the Commission which indicate that the term 'criminal record' is to be given a liberal construction.[8]

99. I find that although the effect of the 'good behaviour order' imposed on Mr AG was that he was not convicted of either offence with which he was charged, the outcome of this proceeding still falls within the scope of 'criminal record' for the purposes of the AHRC Act.

100. For a case of discrimination to be found in DFAT's encouragement of Finite to withdraw Mr AG's services, it would need to be shown that the relevant exclusion was made 'on the basis' of his criminal record. In considering the expression 'based on', in a similar definition of discrimination under s 9(1) of the *Racial Discrimination Act 1975* (Cth), the Federal Court held that the words were to be equated with the phrase 'by reference to', rather than the more limited 'by reason of' or 'on the ground of' which have been interpreted elsewhere to require some sort of causal connection.[9] It does not need to be the sole reason.

101. I find that the exclusion was engaged in by reference to, and therefore on the basis of, the criminal proceedings that Mr AG had been involved in. Those criminal proceedings had prompted the calls from DFAT's Parliamentary and Media Branch to officers in IMD, where Mr AG works, and MCS which includes DFAT's Conduct and Ethics Unit. It is not in dispute that the newspaper report of the criminal proceedings was discussed by Mr Spackman and Ms Bedington during their telephone call or that these proceedings were directly relevant to his termination. DFAT said that Mr Spackman 'alerted' Ms Bedington to the article and that they discussed both the court proceedings and 'the outcome reported in the media'. As DFAT submitted, when Mr Spackman called Ms Bedington it was 'entirely likely that, in circumstances where Finite was motivated by its desire to preserve its commercial relationship with the Department, Ms Bedington would have volunteered to deal with the situation'. I am not persuaded that 'the situation' was only the question of whether Mr AG had reported an event relevant to his security clearance and not also the fact of his involvement in criminal proceedings as reported in the media. Mr Spackman, at the least, encouraged Ms Bedington to withdraw Mr AG's services from DFAT in order to 'deal with the situation'. As a result, Mr AG's employment was terminated.

4.3 Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?

102. I find that DFAT's act in, at the least, encouraging Finite to withdraw Mr AG's services constitutes an impairment of his equality of opportunity and treatment in employment.

103. DFAT submitted that if Mr AG had notified his change of circumstances as required, an assessment would have been undertaken to determine the impact of the change in circumstances on Mr AG's Negative Vetting Level 2 security clearance and, if necessary, the impact of any change in his security clearance on his ongoing engagement at DFAT. However, DFAT made clear that this would not necessarily have led to Mr AG's employment with DFAT ceasing. DFAT emphasised that 'criminal charges do not have the effect of automatically precluding a person from maintaining an acceptable security clearance'.

104. The termination of Mr AG's employment precluded the potential for this assessment to be undertaken, with one potential outcome being Mr AG's employment status remaining unchanged.

105. Mr Williams' email of 11 April 2016 says that he understood that Finite had made the decision to remove Mr AG from DFAT and that:

> Had they not made taken [sic] this step, a code investigation would have certainly been commenced by the CEU [Conduct and Ethics Unit] pursuing a possible contractual breach for failure to abide by the Code.

106. Mr Williams does not speculate in his email about what the result of this investigation would have been.

107. Had DFAT not encouraged Finite to withdraw Mr AG's services, it is possible that Mr AG would have continued working as an SOE Specialist in accordance with the terms of the work order governing his employment. As such, I find that this act constituted an exclusion that impaired Mr AG's equality of opportunity and treatment in employment.

4.4 Was the distinction, exclusion, or preference based on the inherent requirements of the job?

108. Because DFAT has denied forming any view about whether Mr AG's employment should continue, it has not sought to justify the termination of his employment as based on the 'inherent requirements' of the job.

109. Appropriate identification of the inherent requirements of the job is a pre-condition to demonstrating that the complainant is unable to perform those inherent requirements.

110. An 'inherent requirement' is something that is 'essential to the position'[10] and not 'peripheral'.[11] It is an 'essential feature' or 'defining characteristic'[12] of the role.

111. Further, the inherent requirements must be in respect of 'a particular job'. The term 'a particular job' in Article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its 'inherent requirements' are those required by the characteristics of the particular job.[13]

112. Section 3(1) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'. This is an exception to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.[14]

113. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*, Wilcox J interpreted the phrase 'based on' in this context 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 stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.[15]

114. The Full Court affirmed that approach in *Commonwealth v 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]

115. 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.

116. Accordingly, in considering the complaint by Mr AG, I must determine whether there is a sufficiently close or tight connection between the inherent requirements of the job and the exclusion of Mr AG in the circumstances of this case.

117. I accept that holding a Negative Vetting Level 1 security clearance, with the ability to obtain a Negative Vetting Level 2 security clearance is an inherent requirement of the role of an SOE Specialist with DFAT. This is clear from the terms of the work order.

118. The only concern that DFAT has raised about Mr AG's conduct in any of its submissions is that he failed to notify it of his change of circumstances. DFAT says that Mr AG's change of circumstances was relevant to the maintenance of his security clearance. However, as noted above, DFAT has not suggested that Mr AG's criminal record would necessarily have precluded him from maintaining his Negative Vetting Level 2 security clearance.

119. This is consistent with the inquiries that Mr AG has made of the Australian Government Security Vetting Agency (AGSVA). AGSVA confirmed that any change of circumstances would need to be assessed to determine whether it was 'adverse' and whether it warranted a change to an existing (or inactive) security clearance.

120. In Mr AG's case, I consider the following matters to be significant when assessing the seriousness of his criminal record and the likely impact on his security clearance:

    (a) Mr AG admitted that he engaged in the conduct alleged and self-reported to the police at the earliest available opportunity.

    (b) Mr AG entered a plea of guilty to the two charges.

    (c) The Magistrate held that Mr AG's conduct 'falls at the lower end of the scale of objective seriousness'.

    (d) Mr AG was not convicted of either offence as a result of the operation of s 17 of the Sentencing Act.

    (e) Mr AG was required to comply with a 'good behaviour order'.

    (f) There is nothing to suggest that Mr AG has not complied with this good behaviour order.

121. Mr AG's employment was terminated before any reassessment of his security clearance could be undertaken.

122. In the circumstances, I am not satisfied that Mr AG's criminal record means that he would be unable to maintain a Negative Vetting Level 2 security clearance. As a result, I find that DFAT's act in, at the least, encouraging Finite to withdraw Mr AG's services was not based on the inherent requirements of the job as an SOE Specialist. There was not a sufficiently tight or close connection between the act and Mr AG's ability to fulfil the inherent requirements of the job.

5 Findings

123. Having considered all of the material before the Commission in this matter, I find that DFAT encouraged Finite to withdraw Mr AG's services from DFAT, that this was an exclusion based on Mr AG's criminal record, that it impaired Mr AG's equality of opportunity or treatment in employment, and that it was not based on the inherent requirements of the particular role of SOE Specialist.

124. While holding a relevant security clearance was an inherent requirement of the job, I am not satisfied that Mr AG's criminal record meant that he would be unable to maintain the necessary security clearance and be unable to meet this requirement.

125. I find that Finite agreed to the termination of Mr AG's services because it formed the view that this is what DFAT wanted and that DFAT had the ability to terminate the employment of Mr AG on short notice. DFAT submitted that if I were to make findings adverse to it, I should also make findings adverse to Finite. I am not able to be satisfied on the material before me that Finite separately did an act involving a distinction, exclusion or preference on the basis of Mr AG's criminal record. While I have found that DFAT, at the least, encouraged Finite to withdraw Mr AG's services from DFAT, it is possible that DFAT itself terminated the work order for Mr AG's services. In those circumstances, the act of exclusion of Mr AG from employment would be one entirely done by DFAT. I find that Finite did not seek to withdraw Mr AG's services from DFAT because it had separately and independently formed the view that Mr AG's criminal record, or his alleged failure to notify his change of circumstances, meant that he should no longer continue to work at DFAT. I am not satisfied that any relevant conduct of Finite was based on Mr AG's criminal record.

126. I find that DFAT's act constitutes discrimination within the meaning of sections 3 and 31(b) of the AHRC Act.

6 Recommendations

127. 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 the reasons for those findings.[17] The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.[18]

128. The Commission may also recommend:

- the payment of compensation to, or in respect of, a person who has suffered damage; and

- the taking of other action to remedy or reduce the loss or damage suffered by a person.[19]

129. The Commission sought submissions from Mr AG about the recommendations that he was seeking. Mr AG made a claim for compensation in the amount of $150,784.23 comprising the following elements:

- $120,121.39 in lost income
- $870.52 in medical and legal expenses
- $420.00 in other expenses
- $9,372.32 as compensation for their time in dealing with this matter
- $20,000 in general damages for damage to reputation and ongoing health issues including stress and anxiety.

130. 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.[20] I am of the view that this is the appropriate approach to take in relation to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[21]

6.1 Lost income

131. The primary claim for compensation relates to economic loss in the form of lost income. Mr AG was employed on a 12 month contract from 1 March 2016 to 28 February 2017 including a one month 'trial appointment'. His employment was terminated after six weeks. His hourly rate was $110.00 (excluding GST) and his contract anticipated that he would work 8 hours per day, five days per week.

132. If Mr AG's employment had not been terminated, he could have expected to continue in employment with DFAT for a further 46 weeks. In this period, there were 8 public holidays. Working the ordinary hours anticipated by the Work Order, Mr AG could have expected to be paid $880 per day for 222 days or $195,360.

133. After leaving DFAT on 11 April 2016, Mr AG looked for work but was unemployed for around 4 weeks. He first obtained work on 9 May 2016 and worked for that employer continuously until 2 September 2016, at a lower rate of pay than he was receiving at DFAT. During this period, he earned $46,092.

134. Mr AG then changed jobs and was employed by a second employer, again at a lower rate of pay than he was receiving at DFAT. There was a one week break between these jobs. He is still employed by this second employer. During the period he was employed by the second employer up until 28 February 2017, when the first year of his contract with DFAT would have been completed, he earned $31,787.

135. Mr AG's lost income during the relevant period was $117,481. I am satisfied that Mr AG made reasonable attempts to mitigate his loss. He obtained new employment within 4 weeks and there was only one week where he was not employed when moving between his first and second job. I recommend that DFAT pay Mr AG $117,481 to compensate him for his economic loss.

6.2 Expenses

136. Mr AG sought legal advice in relation to his options for pursuing a claim against DFAT and he and his wife have spent time and effort in making submissions to the Commission. They seek compensation for their legal costs, for their own preparation time and for other related costs including travel expenses and office expenses such as phone, internet and stationary expenses.

137. In ordinary civil litigation, a court will typically make an order that the unsuccessful party pay the costs of the successful party. The Commission is not a costs jurisdiction. The Commission's processes are free for both complainants and respondents. Parties are at liberty to seek their own legal advice if they wish, but these are expenses that they are responsible for. I am not minded to make a recommendation that DFAT pay for Mr AG's legal costs, for his preparation time or for his travel and office expenses involved in bringing the complaint.

138. Mr AG also sought to recover certain medical expenses. I do not have enough evidence to assess whether Mr AG suffered from particular medical conditions requiring treatment as a result of the conduct of DFAT. I am not minded to make a recommendation that he be compensated for these expenses.

6.3 General damages

139. Compensation for Mr AG'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.[22]

140. I am satisfied that Mr AG suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record.

141. I accept that losing his position at DFAT has caused him personal distress.

142. I do not have sufficient evidence to assess the claim for damage to Mr AG's professional reputation.

143. In all the circumstances, I consider an award of monetary compensation for hurt, humiliation and distress in the amount of $3,000 is appropriate. I therefore recommend that DFAT pay him that amount in addition to compensation for his economic loss.

7 DFAT's response

144. On 8 March 2018, I provided DFAT with a notice of my findings and recommendations in respect of Mr AG's complaint.

145. By email dated 3 April 2018, DFAT provided the following response to my findings and recommendations:

> I refer to your email dated 8 March 2018 enclosing the findings and recommendations of President Croucher in relation to the complaint by [Mr AG].
>
> The Department has considered the findings and recommendations of the Australian Human Rights Commission in relation to the complaint of criminal record discrimination made by Mr AG. The Department respectfully disagrees with the Commission's findings and recommendations.
>
> Any monetary claim for compensation against the Commonwealth must be handled in a manner that is consistent with the *Legal Services Directions 2017*. The *Legal Services Directions 2017* provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice. The Department has carefully considered its position, and does not consider that there is a meaningful prospect of liability being established against the Commonwealth under Australian domestic law. Accordingly, payment of compensation to Mr AG would not be consistent with the Department's obligations under the *Legal Services Directions 2017*. The Department therefore declines to pay any compensation to Mr AG and advises that it does not intend to take any other action as a result of the findings or the recommendations made [by] the Commission.

146. The argument by DFAT that it is necessary for liability to be established under Australian domestic law before compensation can be paid has been dealt with previously in the context of human rights inquiries under Part II, Div 3 of the AHRC Act (see *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[205]).[23] Equivalent principles apply where the Commission has found that an act or practice constitutes discrimination in employment under Part II, Div 4 of the AHRC Act.

147. The Commission's inquiry was conducted pursuant to s 31(b) of the AHRC Act. That section gives the Commission the function of inquiring into any act or practice that may constitute discrimination. Once an inquiry is concluded, if the Commission finds that the act or practice constitutes discrimination, the Commission is specifically empowered to make recommendations for the payment of compensation (s 35(2)(c)(i)). If compensation is recommended, it is compensation: 'to, or in respect of, a person who has suffered loss or damage as a result of the act or practice'.

148. Parliament has determined that the Commission is to have the power to make recommendations for compensation when there has been discrimination in employment covered by Part II, Div 4 of the AHRC Act. Where discrimination in employment is found, a person may not have any right to bring legal proceedings to recover compensation for the loss or damage suffered as a result of the discrimination. The Commission's power to make recommendations for compensation is not contingent on another breach of domestic law being available. Indeed, the Commission's inquiry function is typically used in situations where there is no other domestic remedy available.

149. As described in the Commission's previous report referred to in paragraph 146 above, there are a range of avenues available pursuant to which non-corporate Commonwealth entities such as DFAT may consider payments of compensation, even where there is no enforceable legal liability, for example, in cases where detriment is caused as a result of defective public administration.

150. On 5 April 2018, the Commission wrote to DFAT drawing its attention to the comments it had made in *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110.

151. On 13 April 2018, DFAT provided the Commission with the following additional comments by email:

> The Department is restricted by the Legal Services Directions in making settlement of legal claims in this matter because the payment of a settlement sum requires the existence of 'at least a meaningful prospect of liability being established' and we do not consider that there is a meaningful prospect of liability being established in this matter.
>
> We have noted your suggestion about alternative payment mechanisms. Without prejudging discussions under such mechanisms, as the Department does not consider that it has acted defectively, a successful claim under the CDDA scheme is unlikely, and we do not consider that the circumstances of this case would give rise to an act of grace payment, which is administered by the Department of Finance, and not the Department of Foreign Affairs and Trade. It is of course open to Mr AG to make a CDDA or act of grace claim and the claims would be considered in accordance with the relevant schemes.

152. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

April 2018

Endnotes

1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
2 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 (Brennan CJ, Toohey, McHugh and Gummow JJ).
3 *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
4 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).
5 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).
6 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).
7 Australian Law Reform Commission (ALRC) in the *Spent Convictions Report*, 1987, No 37 AGPS at [91].
8 HREOC, Report of an inquiry into a complaint by Ms Renai Christensen against Adelaide Casino Pty Ltd of discrimination in employment based on criminal record, July 2002, p 11.
9 *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47 at [4]-[8].
10 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
11 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
12 *X v Commonwealth* (1999) 200 CLR 177, [43] (McHugh J).
13 International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHugh J).
14 *X v Commonwealth* (1999) 200 CLR 177, 222-223 [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [152] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, 32-33 [19], [24], [26] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, 757 [89] (Wilcox J).
15 *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482.
16 *Commonwealth v Bradley* (1999) 95 FCR 218, 235-236.
17 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(a).
18 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(b).
19 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(c).
20 *Commonwealth v Peacock* (2000) 104 FCR 464, 483 [55] (Wilcox J).
21 See: *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
22 *Sharman v Evans* (1977) 138 CLR 563, 585 (Gibbs and Stephen JJ).
23 Australian Human Rights Commission, *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[205]. At www.humanrights.gov.au/our-work/legal/publications/ms-ar-behalf-mr-master-and-miss-au-v-commonwealth-dibp (viewed 4 April 2018).

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