

# EQUAL OPPORTUNITY

## Dealing with employment discrimination

DOMINIQUE ALLEN tells one woman's story

For some time, I have researched anti-discrimination law and I've found it difficult to interview parties to discrimination complaints, even anonymously, due to the tight confidentiality clauses in their settlement agreements. This means we know little about why people make complaints, what they think of the process, or what they want out of it.

Last year, a friend -let's call her Jo - asked for my help with a complaint she was about to lodge at the Australian Human Rights Commission (AHRC). Following conciliation, Jo was prohibited from discussing her complaint but I was able to observe what happened during the first stages of the process and, with Jo's permission, describe what happened.

### Jo's Story

The process of resolving a discrimination complaint is much the same across Australia. The victim lodges a complaint at the AHRC or the equivalent local institution. If the Commission accepts the complaint, it will attempt to resolve it, usually through conciliation. If conciliation is unsuccessful, the victim can litigate. I can disclose only a few details of Jo's complaint. Jo is female, so the complaint was possibly about sex discrimination or sexual harassment. In 2008-09, 24 per cent of the complaints received by the AHRC related to the Sex Discrimination Act 1984 (Cth) and 86 per cent of these were lodged by women. <sup>1</sup> Like the majority of complaints lodged under each Commonwealth anti-discrimination Act,<sup>2</sup> Jo's complaint related to employment. Most discrimination complaints are lodged against an organisation rather than an individual.<sup>3</sup> Jo's was against her employer, not the relevant employees.

### Lodging the complaint

Before she approached the AHRC, Jo tried to resolve the issues internally but found the process to be 'useless'. Management would not listen to her grievance and the organisation's Equal Opportunity Officer did not have enough power to help her. Jo said she lodged a formal complaint as a 'last resort' when matters began to get worse.

Her complaint ran at 11 dense pages (this was after she condensed performance reports, medical opinions, and emails into a cohesive format) and 15 supporting documents. She wrote the complaint without legal representation or assistance from her union. When I read Jo's complaint, I was struck by the number of issues caught up in it. Of course, I only had Jo's side of the story but it clearly pointed towards hostility and unfairness in the way she was treated by her co-workers and superiors. Whether there was discrimination was less clear. I was doubtful that the evidence Jo possessed would be enough to meet the strict legislative definitions if she went to court. Establishing that she was treated less favourably because of an attribute under the relevant statute would be difficult. I anticipated that her employer would argue that the issues in question related to job performance or they would try to excuse their behaviour by saying that Jo was not a team player; the evidence was too grey to prove discrimination,<sup>4</sup>

### Waiting for a response

After she lodged the complaint, the waiting began. Jo asked the AHRC for a conciliation date as soon as possible. She was still employed by the respondent and some outstanding issues needed prompt resolution. After three months, the respondent had not submitted a response to the AHRC, so the conciliation date was postponed. This was the only drawback that Jo identified about the process: Although the AHRC asked her employer to respond within 30 days, there was no penalty if it didn't. Her employer could ask for extension after extension and hope that Jo would give up in the meantime.

After six months, she received the response and, as I had warned, her employer denied all of the allegations in great detail (226 pages of detailed denials, in fact). As a Vulnerable person, this was a lot to confront, especially as the remedy she sought was quite simple - a modest amount of compensation, arrangements for the employment relationship to go forward and an undertaking that her co-workers would deal with her

situation sensitively and confidentially in the future. For Jo, the complaint was not about money. Nor did she want to go to court; she was concerned about the stress of a hearing.

### Conciliation

Jo said that she made the complaint because she wanted her co-workers to understand what she experienced and apologise. She also wanted her employer to know what had happened, learn from the experience and change its ways when dealing with staff in a similar situation.

Jo's situation and her goals going into the conciliation highlight the value of using conciliation to resolve discrimination complaints. The process is informal; inexpensive and flexible. Parties have the opportunity to tell their story and tailor an outcome to their circumstances, rather than having a judge decide for them:



Conciliation has the potential to be a daunting process, especially if there is a power imbalance. Jo didn't relish the thought of sitting opposite a group of her co-workers, armed with the organisation's lawyers, ready to attack. She thought that one co-worker in particular would just want to argue about what had happened. In my experience, for many complainants talking to the respondent and being listened to is all they want. Others want the complaint resolved as quickly as possible. Jo was in the latter group. She was pleased that her employer was taking the complaint seriously but wished management could ensure that her co-workers were too. As it was becoming apparent this wasn't going to happen, Jo's best option was to resolve the complaint. The day before the conciliation, Jo said she would be 'bitterly disappointed' if it didn't work out. How would she continue working in the organisation then!

### Conclusions and confidentiality

Fortunately, Jo's story ended at conciliation. Like many complaints, Jo's 'settlement included a confidentiality clause which prevents her from discussing the settlement negotiation or the outcome, She could only tell me the matter was resolved; -her relief and exhaustion were evident.

Jo's story shows how the system can work effectively. Jo approached a neutral third party which was able to facilitate a resolution between Jo and her employer. We can assume that her employer needed prodding from an outsider, because Jo's use of the organisation's internal processes was futile.

However, Jo's experience also illustrates that confidentiality is a double-edged sword. It is impossible to know if the outcome was satisfactory. The parties settled so they were satisfied to some degree, but we do not know whether one party sacrificed more than the other. We will never know if the outcome was fair, Jo would not have settled the complaint without confidentiality and it is doubtful that her employer would have either. It would not want staff to know what Jo negotiated lest others lodge complaints, Confidentiality allows the community to assume that discrimination is not occurring. We are not aware of the nature of complaints or how they are settled, making it difficult to assess the law's effectiveness or lobby for change. Striking a balance between protecting the parties and maintaining the law's profile remains a challenge.

**DOMINIQUE ALLEN completed a PhD on antidiscrimination law at Melbourne Law School. She is very grateful to 'Jo' for sharing her experience and for permission to write this short article.**

**© 2010 Dominique Allen**

#### **REFERENCES**

1. Australian Human Rights Commission, *Annual Report 2008-09* (2009) 67, 73.
2. Ibid 70, 74, 76, 79.
3. Ibid 69.
4. Proving discrimination can be a problem for complainants. See also Dominique Allen 'Reducing the burden of proving discrimination in Australia' (2009) 31 (4) *Sydney Law Review* 579.