

WORKPLACE VIEW

January 2015

Employers Beware – Is it Safe to Ask?

Jillian Howard, Senior Associate

A recent case has highlighted the need for employers to closely scrutinise their recruitment process to ensure they do not fall foul of anti-discrimination legislation.

The Queensland Civil and Administrative Tribunal (**QCAT**) recently found that a leading retailer had discriminated against a prospective employee by requiring him to provide answers to certain mandatory questions in an online job application.

In December 2013, the applicant in the case applied for the role of console operator. As part of the online application he was required to provide information including his gender and his date of birth. He was also required to provide documentary proof of his right to work in Australia such as an Australian Passport, Citizenship certificate or copy of a relevant work visa.

The applicant contended that the questions were contrary to section 124 of the *Anti-Discrimination Act 1991* (QLD) (**AD Act**), which precludes employers from asking for information on which unlawful discrimination might be based, and declined to complete the application.

The company resisted the claim on the grounds that:

- 1 section 124 did not apply because the request was necessary to comply with, or was specifically authorised by, other legislation (section 124(2)(a) of the AD Act); and/or
- 2 the information was reasonably required for a non-discriminatory purpose (which provided a defence under section 124(3) of the AD Act).

Gender

The company argued that details of the applicant's gender were required to meet the company's obligations to gather statistics on the gender of applicants for positions under the federal government's gender reporting statistics. QCAT's view, however, was that the company's obligation was limited to providing such information that it had gathered through their recruitment process, which did not require them to impose an obligation on applicants to stipulate their gender in an application. Further, QCAT found that, at the time the application was completed, the requirement to provide statistical data had been delayed until 2015.

Date of Birth

The company gave several reasons for requiring applicants to stipulate their date of birth, including:

- an applicant's age determines the entitlements they would receive under the relevant enterprise agreement;
- it enabled the company to differentiate between employees with the same name (having approximately 190,000 employees across Australia); and
- employees must be over the age of 18 to work in some roles, e.g. in its liquor outlets.

Although the company's reasons were legitimate, QCAT was critical about the timing of the company's request for this information. QCAT considered that it was unnecessary to determine a potential employee's employment entitlements until they had, at the very least, been offered a position. With regards to jobs which required employees to be over 18 years old, QCAT concluded that simply asking an applicant to confirm they are over 18, together with an explanation as to why this question is being asked, would suffice and would constitute a valid defence. It was not necessary to obtain the applicant's exact date of birth.



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Right to Work

The company argued that, as a result of its obligations under the *Migration Act 1958* (Cth) it was reasonable and in accordance with its statutory obligations, to request evidence of an applicant's right to work in Australia as part of the application process. QCAT was however again critical of the stage at which this information had been sought, finding that an employer's obligation is not to allow an illegal worker to "work". Such information must therefore be obtained before an employee commences work but not at the application stage.

Compensation for Embarrassment and Humiliation

By the time of the hearing the company had already taken steps to change its online application form. As the applicant had declined to complete the application he was not considered by the company for the position. At best, he suffered a loss of a chance to secure employment for which he was awarded total compensation of AU\$5,000.

Lessons for Employers

Although this claim arose out of a specific aspect of the Queensland AD Act, which is more prescriptive than the discrimination laws of other states or the Commonwealth, employers should carefully consider the questions contained in an application form as part of any application process.

Consideration should be given to whether it is necessary for information to be required from applications at the initial stages of a recruitment process, or whether it should only be sought from successful candidates. Additionally, only information which is related to the requirements of the job should be requested.

Willmott v Woolworths Ltd [2014] QCAT 601

Application Forms – the Do's and Don'ts

Do's

- "Please declare you are over 18 years of age"
- "Please confirm that you have the right to work in Australia. Evidence supporting this will be required if you are offered employment"
- "This role will require significant travel, please advise if anything precludes you from fulfilling the inherent requirements of the role."

Don'ts

- "Please state your date of birth"
- "Attach evidence of your right to work in Australia"
- "Do you have children"



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Employer Reminder

On 23 October 2014 the WA Government made significant progress towards occupational health and safety reform by releasing the draft Work Health and Safety Bill (**WHS Bill**) for public consultation. The WHS Bill is the first official attempt by the government, as part of the harmonisation of workplace safety laws in Australia, to create WA's version of the national model WHS Bill which is currently in place in all states and territories except for WA and Victoria.

As mentioned in our December 2014 edition, the WHS Bill adopts the core provisions of the national model with a few modifications tailored to WA's working environment. We remind you that interested parties have until **30 January 2015** to submit any comments to WorkSafe who will then compile all public comments on behalf of the Government – so one day left! Further details about the WHS Bill and public consultation process can be found on the Department of Commerce website <http://www.commerce.wa.gov.au/publications/public-comment-work-health-and-safety-bill-2014>.

Client Quiz

A sale of business may activate the transfer of business provisions contained in the *Fair Work Act 2009* (Cth) (**the Act**). Which of the following is incorrectly stated as a requirement of 'a transfer of business' within the meaning of the Act?

- a) the old employer sells some or all of its assets to the new employer;
- b) the employee's work to be performed for the new employer is the same or substantially the same as it was for the old employer; or
- c) the employee becomes employed by the new employer within four months of ending their job with the old employer.

The first correct answer emailed to isla.rollason@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Did You Know?

As part of the Modern Award Review, the Fair Work Commission is currently dealing with applications from interested parties seeking the inclusion of issues as common matters across all awards. Of particular note:

1. The NSW Business Chamber has asked for a micro business schedule to replace award provisions which will contain (among other items) a simplified classification structure and require ordinary hours be worked over a maximum six days a week without penalty rates but with standard overtime payable where hours worked are over 38 hours per week. Micro businesses would be those with fewer than five employees (but casuals not counted).
2. The ACTU has asked that all modern awards provide as a common matter an entitlement to ten days paid leave to assist employees experiencing domestic violence – e.g. for seeking legal advice, relocation arrangements or attending court.

For more information, see the Fair Work Commission website www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/sub2-actu-281014.pdf

For more information, see the Fair Work Commission website www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/sub-smallbuss-ABI-260914.pdf

Legislation Update

Legislative Instrument	Stage of Legislation	Proposed Changes
<i>Fair Work Amendment (Bargaining Processes) Bill 2014</i>	House of Representatives – Second Reading debate	<ul style="list-style-type: none">To require parties to discuss workplace productivity measures during bargaining for enterprise agreements (excluding greenfields agreements).To regulate the Fair Work Commission's power to make protected action ballot orders where bargaining claims are excessive or would significantly adversely affect productivity.To require the Fair Work Commission to have regard to all relevant circumstances before making protected action ballot orders.

Save the Date! Events Update

We invite all our readers to attend the information-packed HR Knowledge events detailed below

CPD Day at Squire Patton Boggs, Level 21 Raine Square on 20 February 2015

Employment Law in Australia – 2014 the Year in Review and Looking Forward in 2015 (Session 1, 8 a.m.)

Dominique Hartfield (Senior Associate) and Emily Tan (Associate) will provide an update on recent developments in Australian employment law and what might be expected in 2015.

To register an interest in this event, please rsvp to isla.rollason@squirepb.com

Squire Patton Boggs Speakers at Public Conferences in March 2015

12-13 March 2015 – IES Conference - New IR Laws for HR Managers Conference (Novotel Langley, 221 Adelaide Terrace, Perth)

- Felicity Clarke will speak on 'Your responsibilities to ill and injured workers – Best practice case study' (9:05 a.m., Day 2)
- Dominique Hartfield will speak on 'Restrictive Covenants and Restraints of Trade – Case Law and Emerging Issues' (2 p.m. on Day 2)

27 March 2015 – Adventedge Conference – HR Masterclass Australia

Bruno di Girolami will participate in 'Q&A Roundtable HR Law Masterclass – Your Chance to Ask Any Workplace Law Question'

31 March 2015 – Legalwise Conference - Legal Skills and Ethics for All Lawyers

Kylie Groves will speak on 'Ethics After Hours: Tips and Tricks to Avoid Conduct Complaints for Online Conduct'.

Labour & Employment Seminar Series 2015

This year, the Labour & Employment team will again present its popular seminar series on a variety of topics. We are still finalising these topics for our series, so if you have any suggestions or topics you would like us to cover please let us know by emailing dominique.hartfield@squirepb.com

Contacts



Kylie Groves

Partner
T +61 8 9429 7475
E kylie.groves@squirepb.com



Bruno Di Girolami

Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com



Felicity Clarke (Editor)

Of Counsel
T +61 8 9429 7684
E felicity.clarke@squirepb.com



Dominique Hartfield (Editor)

Senior Associate
T +61 8 9429 7500
E dominique.hartfield@squirepb.com



Anna M. Elliott

Of Counsel
T +61 2 8248 7804
E anna.elliott@squirepb.com

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