Service of referral notices on agents

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Section 167 of the Queensland Anti-Discrimination Act is a potentially powerful weapon to be used by respondents to discrimination complaints. If the Commission has not finished dealing with a complaint within six months after informing the complainant and respondent that the complaint has been accepted, either party may ask the Commission to refer the complaint to the Tribunal.

Why a respondent would ask for this referral

Respondents may use this referral process (should the correct circumstances exist) to place increasing pressure on the complainant. The threat of a complaint actually being referred to the Tribunal and the prospect of being required to give evidence, is often enough to dissuade some complainants from continuing with their complaint. Further, most complainants are non-lawyers and often are not aware of the significance of time limits. On occasion a complainant will, from neglect or oversight, merely fail to respond to the notice given under s167 within the required 28 days and the complaint will automatically lapse leaving the respondent in the clear.

Hence, well-advised respondents will generally attempt to use s167 as a tactical manoeuvre where the drive of the complainant to resolve the complaint through the Tribunal is weak. Where the complainant clearly intends to follow the complaint through to the Tribunal respondents may elect not to use s167, as the governing desire in those circumstances would generally be to slow down the progress of the action. Should a respondent wish to use s167, the situation where an agent has lodged the complaint on behalf of a complainant should be borne in mind.

Service of a s167 notice on an agent

This circumstance arose for consideration in the matter of *Gillespie & Ipex Information Technology Group Ltd v Goodwin* [1998] QSC 138 (20 July 1998) where the question was raised as to whether the complainant had been asked under s167(4)(c) whether they wished the matter to be referred to the Tribunal where the enquiry was not sent to her personally but to her agent by whom she had lodged the complaint.

The legislation

The relevant part of s167 reads - "(4) If the respondent requests the Commissioner to refer the complaint:

(a) the Commissioner must ask the complainant whether the complainant agrees to the complaint being referred; and

(b) if the complainant agrees in writing - the Commissioner must refer the complaint to the Tribunal; and

(c) if the complainant does not agree in writing within 28 days - the complaint lapses, and the complainant cannot make a further complaint relating to the act or omission that was the subject of the complaint;"

The facts of *Goodwin*

The complainant had lodged a complaint with the Commission through her agent, namely a union representative. The Commission had not finished dealing with the complaint within the 6 months specified in s167(1) and accordingly the respondents requested the matter be referred to the Tribunal under s167.

The Commission wrote to the complainant's agent advising of the respondent's request under s167 and advised that a response needed to be received within 28 days of the giving of the notice to the complainant.

At the time the notice was sent to the complainant's agent, the complainant was overseas. When the complainant's solicitors were pressed for a response to the s167 referral they responded that they were unsure as to the expected date of return of the complainant and did not have instructions to respond to that issue.

The appeal

In the appeal heard in this matter, there was no appeal from the finding of fact that the complainant had not been made aware of the s167 notice.

The appeal was purely on the issue of law as to whether the complaint had lapsed at the expiration of 28 days from the complainant's agent receiving the s167 notice.

The appellant's argument

The respondent/appellants relied heavily on the general law of agency in that in accordance with the general rules of agency one who does an act through another is deemed in law to have done the act oneself. Hence if a complainant chooses to lodge a complaint through an agent, they authorise their agent to make the type of decisions required under s167. Therefore a failure of an agent to respond to the s167 notice would cause the complaint to lapse under s167(4)(c).

The decision

However, the Court noted that there are exceptions to the general rules of agency and cited *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 as standing for the proposition that knowledge of an agent is not necessarily imputed to be knowledge of the principal.

Further, the Court said that there is nothing in the Act which actually empowers the agent to make the decision for the complainant in these circumstances. The decision to refer is the complainant's and the complainant's alone. A distinction was drawn between this jurisdiction and litigation in a superior court where the agent was not necessarily a lawyer and hence there are no rules regarding service on an agent or giving the agent certain powers. ▶

The result

Accordingly, it was held that the complainant needed to be advised personally under s167 rather than through the agent for the time period to commence to run. The critical requirement of s167(4) is that the complainant is asked a question and the complaint must respond to that question within 28 days of being asked.

The Court qualified the requirement for the complainant to be asked a question in that the complainant can be asked through an agent, but time will only begin to run when the complainant has been asked. That is, the time limit will not begin to run until the request has reached the complainant personally.

Hence, the 28 day limitation period was held to run only from the time that the complainant received notice of the requirement to refer the matter to the Tribunal. Accordingly the appeal failed and the matter was successfully referred through to the Tribunal.

What this means for respondents

The implications of this decision lie primarily with the Commission who should now ensure that the complainant themselves are made aware of the necessity to refer the matter to the Tribunal if a s167 notice is received. This places respondents in the unenviable position where the benefits of a s167 notice where it is sent to an agent of a complainant may be eroded. After all, if an agent wished to engage in delaying tactics, they could merely not inform the complainant of the existence of the s167 notice. There appears to be no unilateral conduct a respondent may undertake to avoid the situation of *Goodwin*.

What this means for complainants and their agents

Agents should ensure that complainants are fully informed of any s167 notice received and the requirement for the notice to be answered within 28 days of being informed of the notice. It is not clear from the decision of *Goodwin* whether for the 28 days to begin to run the agent may orally inform the complainant of the notice or whether the complainant must receive a copy of the notice. To err on the side of caution, agents should ensure the complainant responds within 28 days from the time the agent informs the complainant of the notice no matter in what form. It appears that it will not be sufficient for the agent to respond to the notice without the complainant's instructions. ■

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Smoke, mirrors and death in a question of class action

Thousands of Australians are ready to sue tobacco companies over the toll their addiction has taken on their health. But it's too late for one man, **Malcolm Brown** report

GREG Durkin, lead claimant in a proposed class action by Australian smokers against tobacco companies, gave videotaped evidence at a bedside hearing at Westmead Hospital last week. He was so gravely ill with lung cancer it was obvious his days were numbered.

Durkin died last weekend, before he could carry through the class action with five other claimants or know whether it would survive legal moves by the tobacco companies to stop it going to court.

Federal Court Justice Murray Wilcox, who last month dismissed an application by the tobacco companies to have the proposed class action struck out, was aware of the urgency of Durkin's situation. He ordered evidence be taken and held for possible later presentation.

Another claimant, Michael Christopher Nixon, seriously ill in Melbourne, was in a similar situation. On Tuesday, when Durkin's death was announced in the Federal Court, the tobacco companies were ready with criticisms of his status as a claimant.

Jeff Sher, QC, for Philip Morris Ltd, cast doubt on whether Durkin fitted the class action, restricted to people whose medical condition – which they claim to be smoking-related – was diagnosed between April 16, 1996 and April 16 this year. Durkin, 51, of Shalvey in the western suburbs, was diagnosed in October last year.

But he had not smoked for five years and, as Sher pointed out, had given up "cold turkey"; from the tobacco company's point of view that militates against the addiction claim.

Opposing the class action are Philip Morris, British and American Tobacco (Australasia) Ltd (a recent merger between Rothmans of Pall Mall Australia Ltd and WD & HO Wills Pty Ltd), and an entity called WD & HO Wills that has been preserved for the purposes of the present legal proceedings.

The companies have applied for a hearing before the Full Bench of the Federal Court to appeal against Justice Wilcox's decision not to strike out the application for a class action.

The companies are arguing that while individuals claiming they have smoking-related conditions can take individual civil actions, a class action is not the appropriate way of proceeding.

Philip Morris has said recent United States court decisions that have gone against tobacco companies should be seen in perspective.

In Washington in July a Superior Court judge ruled out class-action status in a smoking and health case on the grounds that there were too many complexities and individual differences. Lifestyle, general health, and how much and what an individual smoked were significant factors.

"The current trend in US court decisions is that these [smoking and health] cases should not be treated as class actions," says the corporate relations manager for Philip Morris, Nerida White.

But the anti-smoking lobby looks askance at such moves. It believes they are merely a result of the tobacco industry using its enormous financial resources to defend itself against claims that companies have engaged in misleading and deceptive conduct over decades, and have encouraged people to take up a highly addictive habit. The chief executive officer of Action on Smoking and Health (ASH), Anne Jones, says tobacco companies have gone global and prepared for ever-expanding markets.

In Australia her organisation hopes to reduce smoking to 15 per cent of the population by 2005. But the multinational tobacco companies, seeking a 30 per cent increase in consumption of their products, are looking for new smokers in the Pacific Islands and the Third World.

If the lawsuit proceeds, the most likely date is June 13 next year. If successful, it will clear the way for thousands of Australians to join further class actions. Slater and Gordon, representing claimants, has about 2,500 people on its books who fit into the three-year diagnosis period.

One of those is Bill Ryan, 51, a retired plumber of Stanmore. He took special note of last Thursday, August 26. It was the third anniversary of the dreadful day when he went to his doctor complaining of back ache and discovered that one of his lungs was riddled with cancer.

Ryan, who had the lung removed on December 12, 1996, changing his life forever, says he had no inkling when he began smoking after leaving school that it was a dangerous habit. "None at all, none whatsoever," he says. "You felt a bit out of place if you didn't smoke. I ended up smoking 1½ packets a day and, if I had a drink, two packets.

"You see the tobacco ads and you think it is all right. It is the most addictive thing, really. I will certainly be watching what happens with these court cases."

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