



Australian  
Human Rights  
Commission

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**ST v**

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**Endeavour Energy**

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**[2012]** AusHRC 57

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# **ST v Endeavour Energy**

Report into discrimination in employment  
on the basis of criminal record

[2012] AusHRC 57

**Australian Human Rights Commission 2012**



**Australian  
Human Rights  
Commission**

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**Australian  
Human Rights  
Commission**

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July 2012

The Hon. Nicola Roxon MP  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

Pursuant to s 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth), I enclose my report of an inquiry into the complaint made by Mr ST of discrimination in employment on the basis of criminal record by Endeavour Energy.

I have found that the act complained of constitutes discrimination in employment on the basis of the complainant's criminal record.

By letter dated 12 July 2012, Endeavour provided the following response to my notice of recommendations:

We confirm that Endeavour Energy does not intend to make any payment of compensation to Mr [ST], either in the recommended sum of \$6,311.80, or otherwise. As to the AHRC's recommendations regarding training for its human resources and management staff, we are instructed that our client already has stringent and detailed training in place for its staff, which it believes suitability(sic) equips them to make appropriate decisions in relation to whether individuals with a criminal record can meet the inherent requirements of a particular role.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Branson'.

Catherine Branson  
President  
Australian Human Rights Commission

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# 1 Introduction

1. This is a report of my inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Australian Human Rights Commission by Mr ST. The complaint is made against Endeavour Energy, formerly Integral Energy (Endeavour).
2. As a result of my inquiry, I have found that Mr ST was discriminated against on the basis of his criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).
4. I have directed that the complainant's identity be protected in accordance with s 14(2) of the AHRC Act. For the purposes of this report the complainant's identity has been suppressed and replaced with the pseudonym ST.

# 2 Summary

5. On 16 December 2010, Endeavour terminated its consultancy arrangement with Mr ST after discovering that he was convicted in April 2010 for importing prohibited substances.
6. Endeavour denies that its decision to terminate the consultancy arrangement constitutes discrimination in employment. Endeavour submits that its decision did not impair Mr ST's equality of opportunity in employment or occupation because Mr ST was engaged as a consultant rather than an employee.
7. Endeavour also submits that the inherent requirements of Mr ST's job of 'Business Analyst' are trust and confidence and an awareness and commitment to the principles, values and standards set out in its Code of Ethics.
8. Endeavour states that Mr ST's criminal record and the fact that he did not volunteer information concerning this record during the recruitment process, precludes him from being able to perform the inherent requirements of the job.
9. After carefully considering all of the material available to me, I am satisfied that Endeavour's act of terminating its consultancy arrangement with Mr ST constituted an exclusion made on the basis of a criminal record. Further, I have found that Endeavour's act had the effect of impairing Mr ST's equality of opportunity or treatment in employment or occupation. There is little significance for present purposes in the fact that Mr ST was engaged as a consultant rather than an employee.
10. Further, I am not satisfied that Endeavour's termination of the consultancy arrangement was based on the inherent requirements of the job. In reaching this conclusion, I found the following factors persuasive:
  - Mr ST's criminal record was for a single offence. He sought to import the substances for his own use and therefore it was in a sense, a 'victimless' offence. The penalty imposed by the court was a fine of \$6 500.
  - Mr ST's offence has no apparent relationship with his workplace or employment and does not carry with it the suggestion that he is not to be trusted in financial or business matters in the sense that he would use his access to an IT system to defraud or otherwise harm its owner.
  - When placed on notice that Endeavour required information about his criminal record, Mr ST disclosed it.

11. I recommend that Endeavour pay Mr ST a total of \$6 311.80. This amount represents a total of \$11 311.80 (comprising \$9 811.80 for lost earnings and \$1 500 for hurt, humiliation and distress) minus \$5,000 to avoid doubly compensating Mr ST for his loss.

## 3 Outline of complaint

12. On 21 December 2010, Mr ST made a written complaint to the Commission. On 23 February 2011, Endeavour provided a response to Mr ST's complaint. Both parties have provided further submissions in relation to the complaint.
13. I consider the following statements about the circumstances which have given rise to this complaint to be uncontentious:
  - On 15 November 2010, Mr ST entered into a contract with a recruitment agency to provide the services of a 'Business Analyst' to Endeavour for a 12 month period.
  - Neither the recruitment agency nor Endeavour requested Mr ST to disclose his criminal record during the recruitment process.
  - On 15 November 2010, Mr ST started working for Endeavour.
  - On 2 December 2010, Endeavour asked all new contractors to consent to a police security check.
  - Mr ST disclosed to the Human Resources Coordinator, Ms Kirstin Duffy that he had a conviction for importing banned substances that would appear on his police check. He explained to her that he had 'gotten involved with a bad crowd in Queensland' and 'moved to Sydney to get away from his past'.
  - On 16 December 2010, Endeavour received Mr ST's police certificate, which disclosed a conviction on 8 April 2010 for importing prohibited substances.
  - On 16 December 2010, the Business Partner, Ms Blythe Murphy decided to terminate Mr ST's engagement with Endeavour. An officer of Endeavour contacted the recruitment agency and requested a substitute contractor.
  - On 16 December 2010, Mr ST's contract with the recruitment agency to provide services to Endeavour terminated.

## 4 Conciliation

14. The Commission endeavoured without success to conciliate a settlement of the complaint.



# 5 Relevant Legal framework

15. Part II, Division 4 of the AHRC Act, which is comprised of s 30 – s 35, is concerned with the Commission’s functions relating to equal opportunity in employment.
16. Section 31(b) 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) of the AHRC Act requires that the function of the Commission under s 31(b) be performed by the President.
17. 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 AHRC 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.
18. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.<sup>1</sup>

# 6 Findings

## 6.1 Questions to be considered

19. 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.

## 6.2 Whether there is an ‘act’

20. ‘Act’ and ‘practice’ are defined at 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.
21. The material before the Commission reveals that, after receiving the criminal record check with respect to Mr ST, a form entitled ‘Background Check Assessment for Temporary/Agency Staff’ was completed. Examination of the form shows that an officer of Endeavour ticked the box ‘terminate’ as the ‘next steps/actions’ to be taken in respect of Mr ST. In handwriting, next to the box, are the words ‘agency contacted and action taken on 16 February 2010’. I conclude that, after learning of Mr ST’s criminal record, Endeavour took steps to terminate the consultancy arrangement with Mr ST.
22. Mr ST’s contract with the recruitment agency was specifically to provide services to Endeavour rather than to provide services to a number of clients from time to time. Consequently, I conclude that it was as a direct result of Endeavour’s act of terminating the arrangement whereby Mr ST provided services to it that Mr ST’s contract with the recruitment agency was terminated.
23. I therefore conclude that there is an ‘act’ within the meaning of s 30(1) of the AHRC Act; it is Endeavour’s act of terminating the consultancy arrangement with Mr ST.
24. Endeavour has submitted that if any discrimination occurred, it occurred because of the act of the recruitment agency rather than because of its act. I reject this submission. As outlined above, it appears that the recruitment agency terminated Mr ST’s contract only after Endeavour terminated the consultancy arrangement with Mr ST and requested a substitute contractor. Whether any conduct of the recruitment agency also involved discrimination is outside the scope of this inquiry.

## 6.3 Whether Endeavour made a distinction, exclusion or preference on the basis of criminal record

25. Under the AHRC Act, it is sufficient to establish discrimination on the basis of criminal record if a person’s criminal record is ‘a’ reason for any distinction, exclusion or preference. It does not need to be the sole reason.<sup>2</sup>
26. The Background Check Assessment form described above supports the view that Mr ST’s criminal record was a reason for Endeavour’s decision not to allow him to continue in the role of Business Analyst. The form includes no information about Mr ST other than his position title, his manager’s name, the length of his contract, the type of offence committed by him and the age of the offence.
27. Perhaps more importantly, Endeavour admits that it requested the recruitment agency to supply it with a substitute contractor because of Mr ST’s criminal record. In its submissions, dated 23 February 2011, Endeavour states:

Within a month of Mr ST commencing work as a contractor at Integral Energy [Endeavour] it was discovered that he had a recent criminal conviction with respect to the importation of prohibited substances. Given the circumstances, Integral Energy [Endeavour] requested that the [recruitment agency] supply a substitute contractor.
28. The material before the Commission indicates that by deciding that Mr ST could not continue in his role as a Business Analyst, and making the request of the recruitment agency to supply a substitute contractor, Endeavour excluded him from providing services to it. Endeavour’s conduct also indicated its preference for a contractor who did not have Mr ST’s criminal record. It treated Mr ST differently from the way in which it would have treated a contractor who did not have his criminal record.

29. It therefore appears that Endeavour's act of terminating the arrangement whereby Mr ST provided services to it constituted a 'distinction', 'exclusion' or 'preference' made on the basis of criminal record.

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

30. Mr ST claims that Endeavour's act impaired his access to the particular occupation of Business Analyst. Endeavour denies this.
31. The AHRC Act was 'introduced to be the vehicle by which Australia's obligations under the [ILO 111 Convention] are implemented.<sup>3</sup> For this reason, it is appropriate to construe s 3(1) of the AHRC Act in accordance with the construction given in international law to Article 1 of the ILO 111 Convention.<sup>4</sup>
32. Further, the Governing Body of the International Labour Organisation has created a committee known as the Committee of Experts on the Application of Conventions and Recommendations. It is orthodox to rely upon the expressions of opinion of the Committee for the purposes of interpreting the ILO 111 Convention.<sup>5</sup>
33. Article 1(3) of the ILO 111 defines 'employment' and 'occupation' as including access to employment and to particular occupations, and terms and conditions of employment.
34. Further, the background materials to the ILO 111 Convention reveal that the Convention was intended to protect all workers, in all fields, including self-employed workers in both the public and private sector.<sup>6</sup>
35. As outlined above, Mr ST agreed with a recruitment agency to provide services as a 'Business Analyst' to Endeavour for the period 15 November 2010 to 13 November 2011. In his submissions to the Commission, Mr ST states that Endeavour was involved in selecting him for the position. Endeavour has not denied this. It is also apparent that Endeavour retained the right to refuse the services of Mr ST and to request a substitute contractor in his place. I am satisfied that it was relevantly Endeavour that provided the opportunity to work as a 'Business Analyst' to Mr ST.
36. A contractual engagement for a 12 month period is a substantial occupational opportunity. It is clear that Mr ST and his family believed this to be the case as both he and his partner resigned from their former jobs in Brisbane to move to Sydney so that he could take up the position.
37. Finally, Endeavour submits that its actions did not impair Mr ST's equality of opportunity because by the very nature of a consultancy arrangement, a consultant is free to provide his or her services to any person or company, in some cases concurrently. It further submits that upon the termination of Mr ST's contract, he was free to seek either employment or a further consultancy with another person or company. It submits that Mr ST has not provided any evidence that his ability to consult elsewhere was affected by Endeavour's act.

38. I do not accept the relevance of this submission. All workers are free to find future work opportunities once their current engagement is terminated. I therefore see little significance for present purposes in the fact that Mr ST was engaged as a consultant rather than an employee. Further, the act of excluding Mr ST from performing the role of Business Analyst precluded him from gaining the specific occupational experience he would have acquired had he remained in the role for the full period of his contract. This experience included, but was not limited to, the establishment of a particular network of contacts, a thorough understanding of the particular 'Dial Before You Dig' project within its specific regulatory and operational framework, and the further development of his reputation in this field.
39. Accordingly, in my view, Endeavour's act of terminating the consultancy arrangement with Mr ST had the effect of impairing equality of opportunity of treatment in employment or occupation within the meaning of the definition of 'discrimination' in s 3 of the AHRC Act.

## 6.5 Whether that exclusion was based on the inherent requirements of Mr ST's job as a Business Analyst

40. Section 3(1)(c) 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'.
41. Section 3(1)(c) 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.<sup>7</sup>
42. Endeavour submits that its preference for a substitute contractor was based on the inherent requirements of Mr ST's job of Business Analyst.

### (a) Identifying the 'inherent requirements'

43. Appropriate identification of the inherent requirements of the job is a pre-condition to proving that the complainant is unable to perform those inherent requirements.
44. An 'inherent requirement' is something that is 'essential to the position'<sup>8</sup> and not 'peripheral'.<sup>9</sup> It is an 'essential feature' or 'defining characteristic'.<sup>10</sup>
45. 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.<sup>11</sup>
46. As the Commission's guidelines for the prevention of discrimination in employment on the basis of criminal record state:
- Broad general statements about a job's requirements are not clear enough to allow for an assessment of inherent requirements.<sup>12</sup>
47. Endeavour submits that the following are inherent requirements of Mr ST's job as a Business Analyst:
- trust and confidence; and
  - awareness and commitment to the principles, values and standards set out in its Code of Ethics.

48. Endeavour has provided the Commission with Mr ST's position description, which includes 'building trust' as a leadership competency. Further, Endeavour's Code of Ethics includes 'Integrity' under the heading 'Our values'.
49. However, the fact that these requirements appear in the documents recording Mr ST's position description is not sufficient to establish that they are 'inherent requirements' of his particular job. In *Qantas Airways v Christie*,<sup>13</sup> Brennan J considered that the answer to the question whether a requirement is 'inherent' in a position must be answered with reference to the:
- function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.<sup>14</sup>
50. In the same case, Gaudron J stated that an employer could not stipulate 'qualifications or skills which are disproportionately high when related to the work to be done.'<sup>15</sup>
51. It may be assumed that virtually all employers will wish to have trust and confidence in their employees. However, by declaring criminal record as a ground of discrimination for the purposes of the AHRC Act, Australia has made it plain that the mere fact of having a criminal record should not ordinarily disqualify a person for employment. It would defeat the plain purpose of the declaration if it could be argued that, in effect, a clean criminal record is an inherent requirement of most, if not all, jobs.
52. Endeavour submits that 'trust and confidence' are inherent requirements of the job undertaken by Mr ST because he was required to have access to Endeavour's entire IT system. Mr ST disputes that he was required to access the entire IT system. He states that Endeavour's security protocols required access to any IT systems to be signed off by a manager. Endeavour has not responded to this statement in its submissions to the Commission.
53. Further, Mr ST describes his particular job as documenting the current process of the 'Dial Before You Dig' Project and suggesting a new, more automated process. He claims that this required him to spend 99% of his time working in Visio (a process drawing tool) and talking to people working in the 'Dial Before You Dig' work area. Endeavour also does not dispute this statement. I therefore accept this statement as an accurate description of the tasks and skills that made up Mr ST's job.
54. Endeavour also submits that it has particular obligations as a state owned corporation. Endeavour states:
- It is a significant employer. Its employees, whilst not members of the New South Wales Public Service, are in public employment...Being a public employer and subject to the *Independent Commission Against Corruption Act 1988* (NSW), Endeavour Energy has promulgated a Code of Ethics which applies equally to all employees and contractors.
55. Having regard to the functions that Mr ST was required to perform and the nature of Endeavour's business, I conclude that it was an inherent requirement of the job undertaken by Mr ST that Endeavour was reasonably able to have sufficient trust and confidence in him to allow him to work within its organisation having regard to its Code of Ethics; to access its IT system under supervision; to spend time with and talk to others working in the 'Dial Before You Dig' work area; and to develop for it a new more automated process for the 'Dial Before You Dig' project'. I note in this regard that Endeavour is a state owned corporation.

(b) Was the distinction, exclusion or preference ‘based on’ the identified inherent requirements of the job?

56. The phrase ‘based on’ requires more than a ‘logical link’ between the inherent requirements of the job and the distinction, exclusion or preference.<sup>16</sup> Instead, I must be satisfied that there is a ‘tight’ or ‘close’ connection between Endeavour’s act of terminating the arrangement whereby Mr ST provided services to it and the inherent requirements of the job that he was employed to do.
57. In *Commonwealth v Bradley*,<sup>17</sup> Black CJ observed that to interpret the expression ‘based on’ as requiring only a logical link would defeat the Act’s object of promoting equality of opportunity in employment by, in effect, permitting the assessment of a person’s suitability for a particular job on grounds other than their individual merit.<sup>18</sup>
58. Endeavour has submitted that when deciding to terminate the arrangement whereby Mr ST provided services to it, it considered the inherent requirements of the job (as it identified them) together with:
- the date of the conviction (April 2010);
  - the nature of the offence, being the importation of prohibited substances, which it considered to be a very serious offence and one which could not have been committed negligently. The offence was deliberate, involved a high degree of criminality and planning and was not a ‘spur of the moment crime of passion’;
  - the fact that Mr ST had accepted an engagement from his employer, the recruitment agency, to a public employer and failed to disclose his criminal conviction; and
  - Mr ST’s statement to Ms Duffy, the Human Resources Co-ordinator, that he had gotten involved with a bad crowd in Queensland and had moved to Sydney to get away from his past.
59. The object of the provisions of the AHRC Act with which I am concerned is to prevent people from being stereotyped; that is, judged other than in accordance with their individual merit. The decision of the Anti-Discrimination Tribunal in *Wall v Northern Territory Police*,<sup>19</sup> considering the application of legislation prohibiting discrimination on the basis of ‘irrelevant criminal record’ is instructive in this regard. In that case, the Tribunal found that the respondent had not demonstrated a ‘tight correlation’ between the purported inherent integrity requirement and the complainant’s spent criminal record for an offence of theft. The Tribunal commented that it was ‘not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics, [such as merit, experience, personal circumstances, references etc]... – not just criminal history (spent or otherwise)’.
60. Endeavour submits that after considering all of the factors identified in [58] above, it took the view that Mr ST’s criminal record and his lack of candour about it were inconsistent with the principles, values and standards contained in its Code of Ethics and the inherent requirements of Mr ST’s role.
61. In considering this submission, I note that it is not a universal requirement for individuals to disclose criminal convictions during recruitment unless they are specifically asked to do so. The material before the Commission does not disclose that the recruitment agency or Endeavour requested Mr ST to disclose his criminal record during the recruitment phase. Rather, the material indicates that, when placed on notice that Endeavour required information about his criminal record, Mr ST disclosed it. I appreciate, of course, that he may have felt that he had little choice but to do so.

62. It appears that Endeavour did not seek to explore with Mr ST the precise details of his criminal record, including the nature of the prohibited substance which he attempted to import and the context in which he came to offend. Nor is it apparent that it gave him the opportunity to put forward arguments based on his personal or other circumstances in support of his being able to fulfil the inherent requirements of the job which he had by then been doing for one month.
63. In this respect, it is significant that Mr ST's criminal record disclosed only a single offence; nothing suggests that he is a repeat offender. The offence of which he was convicted was in a sense a 'victimless' offence; it appears that he sought to import the prohibited substance for his own use. His conviction does not carry with it any suggestion that Mr ST is a threat to other people in the sense that he has a tendency to behave violently. Nor does it carry with it the suggestion that he is not to be trusted in financial or business matters in the sense that he would use his access to an IT system to defraud or otherwise harm its owner. The offence had no apparent relationship with his workplace or employment. The penalty imposed by the court in which he was convicted was a fine of \$6 500.
64. I conclude that Endeavour has not demonstrated a sufficiently tight and close connection between the inherent requirements of the job being undertaken by Mr ST and its decision to terminate the arrangements whereby Mr ST undertook that job.
65. For the reasons set out above, I find that Endeavour's act of terminating the consultancy arrangement with Mr ST constituted 'discrimination' on the basis of criminal record.

## 7 Recommendations

66. 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 reasons for those findings.<sup>20</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>21</sup>
67. The Commission may also recommend:
- a. the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
  - b. the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>22</sup>
68. Mr ST provided an updated schedule of loss on 26 October 2011. Endeavour made submissions in reply on 3 November 2011.
69. Endeavour submits that the Commission does not have power to make a recommendation in this case because 'it does not intend to change its practices in relation to maintaining high standards regarding the recruitment of individuals with criminal records'. It states that in these circumstances, any recommendation will not aid in the prevention of discrimination against individuals with criminal records by Endeavour.
70. I do not accept this submission. The fact that during an inquiry process, a particular respondent states that it does not intend to act in accordance with a recommendation does not impact on the Commission's power to make recommendations under s 35(2) of the AHRC Act.
71. I note also that the Commission's findings and recommendations will be tabled in Parliament. This promotes an understanding and acceptance, and the public discussion, of equality of opportunity and treatment in employment and occupation in Australia. This is consistent with the Commission's function under s 31(c) of the AHRC Act.

## 7.1 Compensation

72. I am of the view that compensation should be paid to Mr ST for loss and damage suffered. I consider that compensation in the sum of \$6 311.80 is appropriate. In assessing the sum recommended, I have taken into account the matters discussed below.

73. The Federal Court has indicated that tort principles for the assessment of damages in cases of this type should be applied.<sup>23</sup> I am of the view that this is the appropriate approach to take in the present matter. For this reason, so far as is possible by a payment of compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.<sup>24</sup>

### (a) Loss of earnings

74. Mr ST has informed the Commission that he was able to find alternative employment on 24 January 2011. He claims that he suffered economic loss in the amount of \$690 per day from 17 December 2011 to 21 January 2012 less the two weeks in lieu of notice he received on 31 May 2011. His total economic loss for this period is \$9 811.80.

### (b) Hurt, humiliation and distress

75. Compensation for Mr ST'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.<sup>25</sup>

76. Mr ST claims that the 'whole incident has caused him significant stress and anxiety'. He states that his 'occupation with Endeavour was unashamedly terminated' because of his criminal record. He states that he had moved his family to Sydney to take up the role. He had expended an appreciable amount on the move and spent considerable effort to secure accommodation in Sydney for the role. It caused him 'enormous' humiliation, hurt, stress and anxiety to learn that he was without a job only one month after moving to Sydney.

77. I am satisfied that Mr ST suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I note that he was engaged by Endeavour for a relatively short period of one month and found an alternative engagement quickly. I therefore consider a modest award of monetary compensation for humiliation and stress in the amount of \$1,500 is appropriate.

### (c) Reduction

78. The total compensation is \$11 311.80, comprising \$9 811.80 for loss of earnings and \$1500 for hurt, humiliation and distress.

79. However, Mr ST has indicated that he received an amount of \$5000 towards his loss from another entity. To avoid a recommendation that would doubly compensate Mr ST for his loss, I recommend that Endeavour pay Mr ST a total amount of \$6 311.80.



## 7.2 Training

80. I recommend that Endeavour conduct training for its human resources and management staff involved in employment decisions. This training should assist staff to assess fairly whether an individual with a criminal record can meet the inherent requirements of a particular job. In this regard, I draw Endeavour's attention to the Commission's Guidelines for the prevention of discrimination in employment on the basis of criminal record. These Guidelines state that:

an employer will generally need to discuss the relevance of the criminal record with a job applicant or invite them to provide further information, in order to assess whether the person can meet the inherent requirements of the job.<sup>26</sup>

## 8 Endeavour's response to the recommendations

81. By letter dated 5 July 2011, Endeavour was requested to advise the Commission whether it had taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.
82. By letter dated 12 July 2012, Endeavour provided the following response to my notice of recommendations:
- We confirm that Endeavour Energy does not intend to make any payment of compensation to Mr [ST], either in the recommended sum of \$6,311.80, or otherwise. As to the AHRC's recommendations regarding training for its human resources and management staff, we are instructed that our client already has stringent and detailed training in place for its staff, which it believes suitably(sic) equips them to make appropriate decisions in relation to whether individuals with a criminal record can meet the inherent requirements of a particular role.
83. I report accordingly to the Attorney General.



Catherine Branson  
President  
Australian Human Rights Commission

July 2012

- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
- 2 *Kong v Australia Post AHRC Act Report No 3 (1997)*; *Dr Copeman v Yerrigan Health Centre AHRC Act Report No. 37 (2007)*. See: <http://ahrc.gov.au/legal/humanrightsreports/index.html>, (viewed 7 March 2012).
- 3 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 [35] (Black CJ).
- 4 *Commonwealth v Hamilton* (2000) 108 FCR 378, 385 [31] and following.
- 5 *Ibid* [36].
- 6 See: International Labour Organisation, 1988, *General Survey: Discrimination in the field of employment and occupation*, ILC, (42<sup>nd</sup> Session, 1988 Report IV(1)), Appendix and 1996, *General Survey: Equality in Employment and Occupation: Scope of the instruments as regards individuals, definition and grounds of discrimination*, (83<sup>rd</sup> Session, 1996 Report III (4B)), 19, 79-81. See also: International Labour Organisation, *Substantive Provisions of Labour Legislation: The Elimination of Discrimination in Respect of Employment and Occupation*. See: <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/index.html>, (viewed 25 July 2012).
- 7 *X v Commonwealth* (1999) 200 CLR 177, 222-223, [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333, [152.4] 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, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, [89] (Wilcox J).
- 8 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
- 9 *X v The Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
- 10 *Ibid*, [42] (McHugh J).
- 11 International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHughJ).
- 12 The Australian Human Rights Commission, *Guidelines for the prevention of discrimination in employment on the basis of criminal record* (2012), 16. See: [http://www.ahrc.gov.au/human\\_rights/criminalrecord/on\\_the\\_record/index.html](http://www.ahrc.gov.au/human_rights/criminalrecord/on_the_record/index.html) (viewed 25 July 2012).
- 13 *Qantas Airways v Christie* (1998) 193 CLR 280.
- 14 *Ibid*, 284 [1] (Brennan CJ).
- 15 *Ibid*, 295 [34] (Gaudron J).
- 16 *Mr KL v State of NSW (Department of Education)* [2010] AusHRC 42. See: <http://ahrc.gov.au/legal/humanrightsreports/index.html>, (viewed 7 March 2012). See further: *Commonwealth v Bradley (Bradley)* (1999) 95 FCR 218; *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482.
- 17 (1999) 95 FCR 218.
- 18 *Ibid*, 235 [36].
- 19 [2005] Northern Territory Anti-Discrimination Commission (Unreported, Commissioner Fitzgerald, 22 April 2005).
- 20 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
- 21 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
- 22 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
- 23 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 [55] (Wilcox J).
- 24 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 25 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
- 26 The Australian Human Rights Commission, *Guidelines for the prevention of discrimination in employment on the basis of criminal record* (2012), 17. See: [http://www.ahrc.gov.au/human\\_rights/criminalrecord/on\\_the\\_record/index.html](http://www.ahrc.gov.au/human_rights/criminalrecord/on_the_record/index.html) (viewed 25 July 2012).

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