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Employer's job application form found to be discriminatory

Posted on: 19 Mar, 2015 | Contact: Martin Alden

In the recent case of *Willmott v Woolworths Ltd [2014] QCAT 601*, Woolworths was found to have engaged in unlawful discrimination by requesting information in its online job application form with respect to the applicant's gender, date of birth, and proof of their right to work in Australia. The case serves as a timely reminder to employers of the need to be careful when requesting information from job applicants during the recruitment process in order to avoid exposure to claims for breaching anti-discrimination laws.

Background

In December 2013, Woolworths advertised for a console operator's position at a petrol outlet in Queensland. Mr Willmott saw the advertisement and decided to apply for the position using Woolworths' online application system. In completing the application, Mr Willmott was required to provide answers to certain mandatory fields, including his gender, date of birth, and proof of his right to work in Australia. Mr Willmott refused to complete the application and lodged a complaint alleging that Woolworths had breached the Queensland *Anti-Discrimination Act 1991 (the Act)*.

Prior to the hearing of the complaint, Woolworths voluntarily changed its online application form such that the questions the subject of Mr Willmott's complaint were no longer asked. Nevertheless, during the hearing, Woolworths argued that it had not breached the Act as all of the information contained in the online application form was reasonably required for purposes that did not involve discrimination.

In particular, the applicant's date of birth was required as certain positions required the employee to be at least 18 years of age. Further, the applicant's date of birth helped Woolworths determine the applicant's future employment entitlements, for example, employees under 21 years of age may be entitled to be paid at a different rate to those over 21. It also helped Woolworths differentiate between employees with the same name.

In addition, Woolworths argued that the applicant's gender was necessary for it to comply with its obligations under a new Commonwealth Government initiative to gather statistics regarding gender. Woolworths also claimed that it required proof of an applicant's right to work in Australia in order to comply with its obligations under the applicable migration laws.

The decision

The Queensland Civil and Administrative Tribunal did not accept Woolworths' arguments and found that it had engaged in unlawful discrimination.

In particular, the Tribunal held that for those positions that require an applicant to be over 18 years of age, a simple question in the form asking if

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the applicant is over 18 would suffice, together with an explanation on the form as to why the question was being asked and why an answer was necessary. Further, an applicant's date of birth was not necessary to determine employee entitlements until the applicant had in fact been offered the position.

The Tribunal also held that the gender information was not necessary until at or after the interview stage of the recruitment process. In addition, there was no requirement under the migration legislation for an employer to require proof, at the application stage, of an applicant's right to work in Australia. It was held that the sensible approach to take is to simply ask the applicant to nominate the basis on which the applicant has a right to work in Australia. Then, if an interview is undertaken, the relevant documentation may be provided to a recruitment officer for inspection.

The Tribunal awarded compensation to Mr Willmott in the amount of \$5,000 for embarrassment, humiliation and the loss of chance that his job application would have been successful if he had proceed with it in the absence of the discrimination.

Lessons for employers

Whilst the anti-discrimination legislation differs somewhat in each State, this case highlights the need for employers to be careful when requesting information, either verbally or in writing, from job applicants during the recruitment process. The fact that an employer does not intend to engage in unlawful discrimination is irrelevant. We recommend employers review their recruitment documentation, including job application forms, internal selection criteria, and standard interview questions, to ensure they relate strictly to the requirements of the job and could not constitute unlawful discrimination.

If you would like any advice or assistance in relation to the above, please contact **Martin Alden, Partner and Head of Employment & Industrial Relations**, on +61 3 9608 2273 or at m.alden@cornwalls.com.au.

