



Australian
Human Rights
Commission

Gentleman v Linfox Australia Pty Ltd

[2017] AusHRC 113

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**Gentleman v
Linfox Australia Pty Ltd**

[2017] AusHRC 113

Report into unlawful discrimination
based on criminal record

Australian Human Rights Commission 2017



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**Australian
Human Rights
Commission**

January 2017

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of discrimination in employment on the basis of criminal record made by Mr Gentleman against Linfox Australia Pty Ltd.

I have found that Linfox's decision not to employ Mr Gentleman and to exclude him from performing the role he had performed for 7 months through the labour-hire company Programmed constituted an exclusion based on criminal record. Such an exclusion had the effect of impairing Mr Gentleman's equality of opportunity or treatment in employment or occupation. I have found that this exclusion was not based on the inherent requirements of the job.

In light of my findings I recommend that Linfox develop workplace policies in relation to prevention of discrimination in employment on the basis of criminal record, conduct training to assist staff to fairly assess a job applicant with a criminal record, pay Mr Gentleman an amount in compensation for loss of earnings due to his exclusion from employment with Linfox, and pay Mr Gentleman compensation for hurt, humiliation and distress as a result of being discriminated against.

Linfox provided its response to my findings and recommendations on 5 January 2017. I have set out Linfox's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission (the Commission) following an inquiry into a complaint by Mr Robert Gentleman against Linfox Australia Pty Ltd alleging discrimination in employment on the basis of criminal record.
2. This inquiry has been undertaken pursuant to section 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

2 Summary of findings and recommendations

3. As a result of this inquiry, I have found that Mr Gentleman was discriminated against by Linfox on the basis of his criminal record.
4. In light of my findings, I recommend that Linfox:
 - develop workplace policies in relation to prevention of discrimination in employment on the basis of criminal record;
 - conduct training to assist staff to fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular job;
 - pay Mr Gentleman an amount in compensation for loss of earnings, caused by its decision to exclude him from the Linfox role in which he was working, which I have found to be discriminatory; and
 - pay Mr Gentleman \$2,000 in compensation for hurt, humiliation and distress as a result of being discriminated against.

3 Background

3.1 Complaint by Mr Gentleman

5. Mr Gentleman made a written complaint to the Commission on 28 September 2014. He alleges that because of his criminal record Linfox:
 - refused to employ him as a forklift / warehouse operator (Role); and
 - denied him the opportunity to continue working in the Role, which he had already been doing for approximately 7 months through a labour hire company.

6. Based on the information provided by the parties, the relevant facts appear to be as follows:

- a) From approximately 13 February 2014, Mr Gentleman worked in the Role in Linfox's site in Wadonga, Victoria. This work was being undertaken by Mr Gentleman as a labour hire worker, through an employment agency called Programmed Integrated Workforce (Programmed).
- b) In or about July 2014, Linfox management informed Mr Gentleman that the company was happy with his work and invited him to apply for employment directly with Linfox. As part of the employment application process, Mr Gentleman was required to undertake medical, drug and alcohol and police background checks.
- c) On 10 July 2014, Mr Gentleman signed a document consenting to Linfox obtaining a criminal and traffic offence record check (Criminal Record Form).
- d) While a copy of the Criminal Record Form has not been provided to the Commission, it appears from the parties' submissions that its terms required individuals to disclose criminal offenses which were less than 10 years old.
- e) Several weeks after completing the Criminal Record Form, Mr Gentleman received a call from an individual at Linfox's head office in Melbourne. According to Mr Gentleman's recollection of this call:
 - he was asked to provide further information about his criminal record, particularly in relation to charges of theft of an automobile and possession of cannabis;
 - he was told not to be too concerned as 'we are just confirming we have the right person', or words to that effect;
 - he told the Linfox employee that these offences were over 10 years old and he was not sure whether he received a conviction for the offences.
- f) On or about 16 September 2014, Mr Gentleman received a call from a representative of Programmed at approximately 9.00pm, 2 hours before he was due to commence a shift at Linfox. He was informed that he was no longer allowed on site to work for Linfox, as he did not satisfy the requirements to become a Linfox employee.
- g) In the days following, Mr Gentleman spoke about this matter to site managers at Linfox's Wadonga site, under whose supervision he had worked. Mr Gentleman states that they subsequently informed him that they had escalated the matter to Linfox's head office and were told that:
 - Mr Gentleman does not meet the requirements to become a Linfox employee; and
 - They were not at liberty to discuss the reasons for Linfox's decision.

7. In connection with his complaint, Mr Gentleman submits as follows:
- a) His criminal record has some serious offences but they are in no way relevant to the duties and job requirements of the Role, which he had been performing for the preceding 7 months.
 - b) He was happy with his job and took pride in the work that he did at the Linfox site, which his site managers would 'gladly confirm'.
 - c) He would like to be given the chance to return to work in the Role (whether as a Linfox employee or a Programmed employee).
 - d) He seeks an opportunity to explain himself to Linfox and to attain some further understanding as to why he did not meet their requirements, which may affect his future employment opportunities.
 - e) Prior to working at the Linfox site, he worked for Woolworths Distribution and Logistics for 6 and a half years, performing very similar duties to those he performed at the Linfox site.

3.2 Response of Linfox

8. On 23 February 2015, Linfox provided a response to the complaint (Response), along with copies of:

- A 'Position Profile' of the Role; and
- A 2 page extract from a CrimTrac Criminal Record Check Results Report for Mr Gentleman.

9. In its Response, Linfox stated:

The Position Summary contained within the Position Profile details the inherent requirements of the role which are underpinned by the Key Behaviours. It is the position of Linfox that the inherent requirements and the key behaviours are inextricably entwined.

Mr Gentleman was not offered employment on the basis of not providing the details of a criminal conviction (possess cannabis & deal property suspected proceed of crime) which was less than ten years old. One of Linfox's fundamental values is Integrity which requires honest and ethical dealings from all who interact with its business. Trust and confidence goes to the heart of any employment relationship, hence the reason for not offering Mr Gentleman employment with Linfox.

10. The Position Profile of the Role provides the following 'Position Summary':

The Warehouse Operator are [sic] responsible for picking and packing loads as required to meet customer demand and KPI's as set out in the customer contract.

11. The CrimTrac Check Results Report was a 21 page document, run by CrimTrac on 16 August 2014 and provided to Linfox. The 2 page extract of the Check Results Report records the following criminal history:

Disclosable History			
Court	Date	Offence	Result
WADONGA MAGISTRATES COURT	19/12/2001	THEFT OF A MOTOR VEHICLE (3 Charges)	ON EACH CHARGE: Without conviction, a Community Based Order for 12 MONTHS To perform 125 HOURS of unpaid community work over 12 MONTHS. Licence cancelled and disqualified for 6 months. Order on licence effective from 19/12/2001.
WADONGA MAGISTRATES COURT	19/12/2001	THEFT INTENTIONALLY DAMAGE PROPERTY	Without conviction, a Community Based Order for 12 MONTHS. To perform 125 HOURS of unpaid community work over 12 MONTHS.
WADONGA MAGISTRATES COURT	19/12/2001	RECKLESS CONDUCT ENDANGER SERIOUS INJURY	With conviction, fined \$1,500.00.
WADONGA MAGISTRATES COURT	09/12/2003	FAILURE TO COMPLY WITH UNDERTAKING ORDER	PROVEN
WADONGA MAGISTRATES COURT	20/01/2005	POSSESS CANNABIS USE CANNABIS	Convicted and a Community Based Order for 12 MONTHS. To perform 200 HOURS of unpaid community work over 12 MONTHS.
WADONGA MAGISTRATES COURT	20/01/2005	DEAL PROPERTY SUSPECTED PROCEED OF CRIME	Convicted and a Community Based Order for 12 MONTHS. To perform 200 HOURS of unpaid community work over 12 MONTHS.

Disclosable History			
Court	Date	Offence	Result
WADONGA MAGISTRATES COURT	20/12/2005	FAILURE TO COMPLY WITH CBO	Proven
WADONGA MAGISTRATES COURT	20/12/2005	Breach Re 20/01/2005 POSSESS CANNABIS USE CANNABIS DEAL PROPERTY SUSPECTED PROCEED OF CRIME	With conviction, fined an aggregate of \$1,000.00

4 Relevant Legal Framework

12. Part II, Division 4 of the AHRC Act is concerned with the Commission's functions relating to equal opportunity in employment.
13. 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 section 31(b) be performed by the President.
14. Section 3(1) of the AHRC Act defines discrimination for the purposes of section 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.

15. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

5 Consideration

16. In deciding whether there has been discrimination within the terms of section 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 section 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.

5.1 Is there an act or practice?

17. 'Act' and 'practice' are defined at section 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.

18. On or about 16 September 2014, Linfox decided not to employ Mr Gentleman in the Role and to exclude him from working in the Role through the labour hire firm, Programmed. I am satisfied that this was an 'act' within the meaning of section 30(1) of the AHRC Act.

5.2 Does the act involve a distinction, exclusion or preference on the basis of criminal record?

19. I consider that Linfox's decision not to employ Mr Gentleman and to exclude him from performing the Role through Programmed constitutes an 'exclusion' within the scope of the definition of 'discrimination' in the AHRC Act.

20. For a case of discrimination to be found regarding Linfox's decision to exclude Mr Gentleman from working in the Role, it would need to be shown that the relevant exclusion was made 'on the basis' of his criminal record. In considering the expression 'based on', in a similar definition of discrimination under section 9(1) of the *Racial Discrimination Act 1975* (Cth), the Federal Court held that the words were to be equated with the phrase 'by reference to', rather than the more limited 'by reason of' or 'on the ground of' which have been interpreted elsewhere to require some sort of causal connection.² It does not need to be the sole reason.
21. There is a dispute between the parties as to the basis of Linfox's exclusion of Mr Gentleman. Mr Gentleman submits that it was on the basis of his criminal record. Linfox submits that it was on the basis of Mr Gentleman not providing truthful disclosure of his criminal offences which were less than 10 years old.
22. In its submissions, Linfox has stated that:
- Mr Gentleman was not offered employment on the basis of not providing the details of a criminal conviction (possess cannabis & deal property suspected proceed of crime) which was less than ten years old ... Trust and confidence goes to the heart of any employment relationship, hence the reason for not offering Mr Gentleman employment with Linfox.
23. On 10 July 2014, Mr Gentleman signed the Criminal Record Form consenting to Linfox obtaining a criminal and traffic offence record check. I understand this form also required applicants to disclose criminal offences which were less than 10 years old. Mr Gentleman did not make this disclosure.
24. Several weeks after completing the Criminal Record Form, Linfox asked Mr Gentleman to provide some further information in relation to his criminal history (including in relation to offences that were more than 10 years old and for which no conviction was received). Mr Gentleman states that he fully disclosed his criminal history to Linfox at this time 'noting that I believed any past convictions were more than ten years old and apologised for any misunderstandings'.
25. On balance, I accept the submission of Mr Gentleman that Linfox's exclusion was made by reference to and therefore on the basis of his criminal record. In this regard, I note that Linfox made its decision to exclude Mr Gentleman shortly after receipt of his criminal record.
26. I accept that there may have been more than one reason for Linfox's decision to exclude Mr Gentleman, and that Mr Gentleman's failure to disclose criminal offences which were less than 10 years old on the Criminal Record Form may have been a factor in its decision. However, in circumstances where Mr Gentleman had:
- authorised CrimTrac to provide his criminal record check to Linfox, thereby intending that the details of his criminal record would become known to Linfox;
 - provided further information to Linfox in relation to his criminal history when requested to do so; and

- provided an explanation as to why he had not disclosed those offences which were less than 10 years old on the Criminal Record Form,

I am not persuaded that an alleged lack of candour was the basis for Linfox's decision to exclude Mr Gentleman from the Role.

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

27. The decision by Linfox not to employ Mr Gentleman in the Role and to exclude him from continuing to work in the Role through Programmed constitutes an impairment of his equality of opportunity and treatment in employment.
28. There are two aspects to Linfox's exclusion of Mr Gentleman. First, Linfox decided not to employ him directly as an employee. Second, it indicated to Programmed that it would no longer accept Mr Gentleman's services in the Role.
29. Had Linfox not made this decision, Mr Gentleman would have:
- continued working in the Role through the labour hire firm, Programmed and earned a wage, as he had done so for the preceding 7 months; or
 - commenced work in the Role as a Linfox employee, earning a wage.
30. Mr Gentleman was not given the opportunity to do either of these things as a result of Linfox's decision to exclude him from the Role. This decision constituted an exclusion which impaired Mr Gentleman's equality of opportunity and treatment in employment.

5.4 Was the exclusion based on the inherent requirements of the job?

31. 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'. Given my finding that Linfox's decision to exclude Mr Gentleman from working in the Role was an exclusion on the basis of criminal record, I must consider whether the exclusion was based on the inherent requirements of the job.
32. 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.³

33. Linfox submits that its exclusion of Mr Gentleman was based on the inherent requirements of the job. Linfox appears to submit that trust and confidence are the inherent requirements of the Role which Mr Gentleman could not meet. It states:

One of Linfox's fundamental values is Integrity which requires honest and ethical dealings from all who interact with its business. Trust and confidence goes to the heart of any employment relationship, hence the reason for not offering Mr Gentleman employment with Linfox.

(a) *Identifying the 'inherent requirements'*

34. 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.

35. An 'inherent requirement' is something that is 'essential to the position'⁴ and not 'peripheral'.⁵ It is an 'essential feature' or 'defining characteristic'.⁶

36. 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.⁷

37. The Position Summary provides that an employee in the Role is 'responsible for picking and packing loads as required to meet customer demand and KPIs as set out in the customer contract'. This appears to be the key characteristic of the forklift / warehouse operator Role.

38. Linfox states that the Position Summary details the inherent requirements of the Role. I accept that the Position Summary, together with the Key Accountabilities section, sets out the inherent requirements of the Role. These are, in effect:

- Picking/packing loads utilising the relevant technology;
- Adhering to all safe work policies and practices in undertaking work;
- Maintenance of accurate 'load orders' and paperwork in relation to load despatching;
- Undertaking of work and conduct at work in accordance with Linfox corporate values.

39. The ‘corporate values’ are referred to as ‘Key Behaviours’ in the Position Profile document. Linfox further states that the inherent requirements of the Role and the Key Behaviours are inextricably entwined. The following ‘Key Behaviours’ appear relevant:

Ethics & Values	<ul style="list-style-type: none"> • Ability to articulate values • Ability to see things through the eyes of others • Connects values with actions • Doesn’t attack people, attacks problems; maintains composure • Admits mistakes
Integrity & Trust	<ul style="list-style-type: none"> • Shows consistency; actions match words • Treats others with dignity/respect • Keeps confidences • Willing to admit mistakes • Focuses on the part of the truth he/she can disclose

40. I accept that ‘Integrity and Trust’, a Key Behaviour listed in the Position Profile, is an inherent requirement of the Role.

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

41. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,⁸ Wilcox J interpreted the phrase ‘based on’ as follows:

In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant ‘distinction’, ‘exclusion’ or ‘preference’. Otherwise, as Mr O’Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words ‘based on’ are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.⁹

42. The Full Court affirmed that approach in *Commonwealth v Bradley*¹⁰ (Bradley). In particular, Black CJ discussed the phrase ‘based on’ as follows:

Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group, whether that group be one of gender, race, nationality or age. These considerations must be reflected in any construction of the definition of ‘discrimination’ presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.¹¹

43. The Chief Justice then held that there must be more than a ‘logical’ link between the inherent requirement of the position and the exclusion of the applicant. Rather, his Honour held that there must be a ‘tight’ or ‘close’ connection.
44. As set out above, Linfox submits that Mr Gentleman’s failure to disclose certain convictions which were less than 10 years old means that he does not have the requisite degree of integrity and trust required of an employee in the Role; therefore, Linfox alleges, he was excluded from the Role based on his inability to comply with this inherent requirement.
45. During the Commission’s investigation into the complaint, Mr Gentleman provided the following explanation in relation to his alleged lack of candour in failing to disclose past criminal convictions:

I did not withhold any information based on my criminal record and I was in fact called personally by the Linfox head office in Melbourne in regards to this, whereupon I fully disclosed my criminal history, noting that I believed any past convictions were more than ten years old and apologised for any misunderstandings.

I do note that the possession of cannabis charge referred to was nine years and nine months old at the time of disclosure, however I had no intention of being dishonest or trying to withhold any information as I have previously stated. If I know Linfox will be reading my criminal record, what would be the point in failing to disclose information that they will surely see? I would think one can be forgiven for a miscalculation over such a long period of time (10 years) especially considering I did not have a copy of the information myself.

46. In July 2014, at the time Mr Gentleman completed the Criminal Record Form, his 20 January 2005 convictions (for possession of cannabis and dealing with property that is suspected to be a proceed of crime) were 9 years and 6 months old. He received a community based order (CBO) for these convictions. Mr Gentleman did not comply with the CBO – this being an offence, for which he was convicted and fined \$1,000.00 on 20 December 2005. Accordingly, his most recent conviction is failure to comply with a CBO, which was 8 years and 7 months old at the time.

47. I accept Mr Gentleman's explanation as to why he didn't provide disclosure of these convictions on the Criminal Record Form. In my view, any failure by Mr Gentleman to provide full disclosure on the Criminal Record Form must be balanced against the fact that he:
- authorised CrimTrac to provide his criminal record check to Linfox, therefore intending that the details of his criminal record would become known to Linfox; and
 - provided further information in relation to his criminal history to Linfox when requested to do so.
48. In these circumstances, I do not consider that any failure to provide disclosure of these convictions on the Criminal Record Form means that Mr Gentleman is unable to comply with the inherent requirement of 'integrity and trust'. Moreover, Mr Gentleman had been working at Linfox in the Role for 7 months with nothing to suggest that he could not comply with the inherent requirements of integrity and trust.
49. As stated above, it is Linfox's submission that Mr Gentleman could not perform the inherent requirements of the job because of his failure to accurately disclose his criminal record rather than because of the criminal record itself. However, for completeness, I will consider Mr Gentleman's criminal record. Mr Gentleman's most recent offences occurred more than 8 and a half years ago. He received a community based order for 2 of the offences and a fine of \$1,000 for the third. In the period since the offending conduct occurred, Mr Gentleman had been working for Woolworths Distribution and Logistics for 6 and a half years, performing very similar duties to those he performed at the Linfox site. Moreover, Mr Gentleman had been working at Linfox in the Role for 7 months without incident. Whilst the offences do raise issues of integrity and trust, in light of the passage of time since the offences occurred and the fact that Mr Gentleman has successfully maintained employment during the intervening period, I am not persuaded that he was unable to perform the inherent requirements of the Role.
50. I find that Linfox has not demonstrated a sufficiently tight and close connection between the inherent requirements of trust, honesty and integrity and its refusal to employ Mr Gentleman in the Role, or allow him to continue working in the Role through the labour hire firm Programmed. I am not persuaded that Mr Gentleman was unable to perform the inherent requirements of the Role.
51. I find that Mr Gentleman was discriminated against by Linfox on the basis of his criminal record.

6 Recommendations

52. 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.¹² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹³
53. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.¹⁴

6.1 Mr Gentleman's submissions

54. Mr Gentleman made submissions that he sought 'financial compensation given the hardships I have encountered as a direct result of my unemployment and increased difficulty obtaining new employment'.
55. He stated that he:
- was 'insulted that Linfox would not give me the time of day to meet and judge me for themselves'; and
 - found it 'distressing and confusing not to be given a direct and clear explanation as to why I was not permitted to work at any of the Linfox sites'.

6.2 Consideration of compensation

56. In considering the assessment of a recommendation for compensation in cases of this type, the Federal Court has indicated that tort principles for the assessment of damages should be applied.¹⁵ I am of the view that this is the appropriate approach to take in relation to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.¹⁶

(a) *Hurt, humiliation and distress*

57. Compensation for Mr Gentleman'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.¹⁷
58. I am satisfied that Mr Gentleman suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I accept that losing the Role at the Linfox site, and Linfox refusing to employ him in the Role, has caused him personal distress.
59. In all the circumstances, I consider an award of monetary compensation for hurt, humiliation and distress in the amount of \$2,000 is appropriate. I therefore recommend that Linfox pay him that amount.

(b) *Economic loss*

60. Mr Gentleman has made a claim for past economic loss, being the difference between what he has earned and what he would have earned had he continued working in the Role through the labour hire firm Programmed or worked in the Role as a Linfox employee.
61. Mr Gentleman has provided his bank statements from February 2014 to date and a number of payslips which he was able to locate.
62. As set out above, Mr Gentleman had been employed through the labour hire company Programmed to work in the Role at Linfox for a period of approximately 7 months. His weekly hours and income in the Role varied. However, based on a review of Mr Gentleman's bank statements, I find that his total net earnings from the Role were \$28,856.40, being approximately \$930.85 per week. Mr Gentleman ceased working in the role on 16 September 2014.
63. Mr Gentleman secured alternative employment in mid-March 2015. This was a position at Randstad Pty Limited, a labour hire company, through which he worked in roles at VisyFoods Wadonga as a warehousing and forklift operator and at Danone as a general labourer. Mr Gentleman was out of work for a total of 27 weeks prior to securing the position at Randstad Pty Limited.
64. I understand that Mr Gentleman earned less in the position at Randstad than he had earned when he performed the Role at Linfox through the labour hire company, Programmed. However, his hours of work and income in the Role varied over the 7 month period he was employed by Programmed, and he had no guaranteed minimum hours of employment each week. I am not minded to make a recommendation for economic loss for the period after he secured alternative employment at Randstad in mid-March 2015.

65. During periods without work, Mr Gentleman was eligible to receive Centrelink payments. In the period from 16 September 2014 to mid-March 2015, Mr Gentleman received \$5,966.46 in Centrelink payments.
66. I note that in the time that Mr Gentleman was out of work, he had to establish he was an active job seeker in order to be eligible for Centrelink’s Newstart Allowance.¹⁸ He states that he applied for tens of jobs, including at:
- Watson’s Coldstore in Wadonga;
 - Rapid Performance in Wadonga;
 - Mountain H2o in Albury;
 - Woolworths Distribution at Barnawartha; and
 - ‘other logistics and warehousing jobs as they were advertised’.

67. Additionally, Mr Gentleman participated in a job search course through Centrelink, over the course of approximately 2 weeks, to better his prospects of obtaining alternative employment.

68. I therefore calculate Mr Gentleman’s economic loss as follows:

Amount he would have earned had he continued in the Linfox Role during the period 16 September 2014 – mid-March 2015	\$25,132.95
Amount he earned in Centrelink payments during the period 16 September 2014 – mid-March 2015	\$5,966.46
Economic loss	\$19,166.49

69. I recommend that Linfox pay Mr Gentleman an amount for the economic loss he incurred while making a reasonable attempt to mitigate his loss. I note that while it is standard practice for courts and tribunals in Australia to calculate past loss of wages by using gross figures (as the actual payment of taxation on any compensation which relates to lost earnings is a matter for the taxpayer)¹⁹ gross figures were not made available to the Commission in this case.

6.3 Consideration of Linfox’s policies and training

70. As part of this inquiry, on 25 September 2015, the Commission wrote to Linfox requesting further information to enable me to conduct this inquiry. Among other information, Linfox was requested to provide:

- copies of any Linfox policies and procedures relating to anti-discrimination in employment and criminal record screening of potential employees.

71. On 19 October 2015, Linfox responded to this request for further information, saying it ‘does not intend to make any further submissions.’ Accordingly, I have not had the opportunity to review any of Linfox policies relevant to anti-discrimination in employment or criminal record screening.
72. Nevertheless, in light of my findings, I recommend that Linfox reassess its policies in relation to prevention of discrimination on the basis of criminal record. In this regard, I draw Linfox’s attention to the Commission’s publication *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record (Guidelines)*.²⁰
73. The Guidelines state:

9. A written policy and procedure

If an employer decides that a criminal record is relevant to the positions of a workplace, a written policy can help ensure that all staff have an understanding of the organisation’s requirements and the legal obligations of the organisation towards people with a criminal record. A policy and an outline of procedure can be incorporated into other workplace policy on equal opportunity and anti-discrimination if such policy exists.

Ideally, a policy and procedure would include:

- a statement about the employer’s commitment to treating people with a criminal record fairly and in accordance with anti-discrimination, spent conviction and privacy laws
- a brief summary of employee and employer rights and responsibilities under these laws, or inclusion of up-to-date literature which provides this information
- an outline of other relevant legal requirements for the workplace, such as the employer’s responsibilities under licensing and registration laws, or working with children laws
- the procedure for assessing the inherent requirements of the position, requesting criminal record information if necessary and assessing individual job applications or employee histories
- information on internal or external complaint or grievance procedures if someone thinks they have been unfairly treated
- designated officers with responsibility for different elements of the procedure.

In order for a policy to gain widespread acceptance, it is vital that staff, workplace representatives and management are involved in the development of the policy.

Developing appropriate policies and procedures does not have to be overly complex or long. However, any policy should be clear, informative and available to all staff and job applicants.

74. I also recommend that Linfox 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 perform the inherent requirements of a particular job. Again, I draw Linfox's attention to the Guidelines, which state as follows:

5.10 Assessing a job applicant's criminal record against the inherent requirements of the job

In some cases, the connection between the criminal record and the job will be clear enough for the employer to decide on the suitability of the applicant for the job ...

However, *in most cases* it will be unclear to the employer simply on the basis of the results of a police check alone whether or not the conviction or offence is relevant to the inherent requirements of the job ...

An employer will generally need to discuss the relevance of the criminal record with the job applicant, or invite them to provide further information, in order to assess whether the person can meet the inherent requirements of the job.

...

The type of information which an employer may need to consider when assessing the relevance of a person's criminal record includes:

- the seriousness of the conviction or offence and its relevance to the job in question
- whether in relation to the offence there was a finding of guilt without conviction, which indicates a less serious view of the offence by the courts
- the age of the applicant when the offence occurred
- the length of time since the offence occurred
- whether the applicant has a pattern of offences
- the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context
- whether the applicant's circumstances have changed since the offence was committed ...
- whether the offence was decriminalised by Parliament ...
- the attitude of the job applicant to their previous offending behaviour
- references from people who know about the offending history.²¹

75. I also draw Linfox's attention to Part 4 of the Guidelines, which discusses (among other matters) how an employer should determine whether a criminal record is relevant to the inherent requirements of a job and key principles in case law for assessing the inherent requirements.

7 Response to Recommendations

76. On 17 November 2016 I provided a notice to Linfox under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaint.
77. By email dated 5 January 2017 Linfox provided the following response to my findings and recommendations:

In relation to your correspondence dated 17 November 2016 we disagree with the findings and recommendations that you have made.

Mr Gentleman was not offered employment on the basis of not providing the details of a criminal conviction (possess cannabis use cannabis & deal property suspected proceed of crime) which was less than ten years old. One of Linfox's fundamental values is Integrity which requires honest and ethical dealings from all who interact with its business. Trust and confidence goes to the heart of any employment relationship, hence the reason for not offering Mr Gentleman employment with Linfox.

For the reasons outlined above Linfox does not intend to make any payment of compensation to Mr Gentlemen.

78. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

January 2017

Endnotes

- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
- 2 *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47.
- 3 *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).
- 4 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
- 5 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
- 6 *X v Commonwealth* (1999) 200 CLR 177 [43] (McHugh J).
- 7 International Labour Organisation, *General Survey: Equality in Employment and Occupation* (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 [72] (McHugh J).
- 8 (1998) 158 ALR 468.
- 9 Above, at 482.
- 10 (1999) 95 FCR 218.
- 11 Above, at 235-236.
- 12 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
- 13 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
- 14 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
- 15 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 16 See: *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 17 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
- 18 Centrelink, Newstart Allowance Eligibility Basics, <https://www.humanservices.gov.au/customer/services/centrelink/newstart-allowance>.
- 19 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008), 711.
- 20 Available at www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf.
- 21 On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record, at www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf, 14-19.

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