

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 21/12/2015 11:29:45 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application Under the Australian Human Rights Commission Act 1986 - Form 116 - Rule 34.163(1)
File Number:	VID1367/2013
File Title:	Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink, which appears to read "Warwick Soden".

Dated: 21/12/2015 2:06:17 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**Second Further Amended Originating application under the**  
**Australian Human Rights Commission Act 1986**

No. VID 1367 of 2013

Federal Court of Australia  
District Registry: Victoria  
Division: General Division

**TYSON DUVAL-COMRIE (by his litigation representative KAIRSTIEN WILSON)**

Applicant

and

**COMMONWEALTH OF AUSTRALIA**

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:** Owen Dixon Commonwealth Law Courts Building  
305 William Street  
Melbourne VIC 3000

Filed on behalf of  
Prepared by  
Law firm  
Tel  
Email  
**Address for service**

The Applicant  
Kelly Thomas  
Maurice Blackburn Lawyers  
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KMThomas@mauriceblackburn.com.au  
Level 10, 456 Lonsdale St, Melbourne, Victoria 3000



Date: 21 December 2015

Signed by an officer acting with the authority  
of the District Registrar

### Details of claim under the Australian Human Rights Commission Act 1986

This application is brought by the Applicant under section 46PO of the *Australian Human Rights Commission Act 1986* as a representative party under Part IVA of the *Federal Court of Australia Act 1976*.

The Applicant and the group members to whom this proceeding relates (**Group Members**) are all intellectually disabled workers, each of whom, as at 22 October 2013, was or had been ~~was~~ employed in an Australian Disability Enterprise (**ADE**) ~~as at 22 October 2013~~ and each of whose wage had been, or at 22 October 2013 was proposed to be, assessed using the Business Services Wage Assessment Tool (**BSWAT**).

The Applicant claims that the Respondent has discriminated against him and the Group Members by causing, inducing or aiding the respective Australian Disability Enterprises which employ or have employed the Applicant and the Group Members (**relevant ADEs**) to assess his and their wages under BSWAT.

### Legislation

The Applicant claims that the discrimination complained of is unlawful under sections 6, 15, 24, 29 and 122 of the *Disability Discrimination Act 1992* (**DDA**).

### Remedy sought

1. A declaration that the Respondent has unlawfully discriminated within the meaning of section 122 of the DDA against the Applicant and the Group Members in causing, inducing or aiding the respective Australian Disability Enterprises which employ or



have employed the Applicant and the Group Members (**relevant ADEs**) to assess his wages and their wages under BSWAT in contravention of:

- a. section 6;
- b. section 15;
- c. further or alternatively, section 24;
- d. further or alternatively, section 29;

of the DDA.

2. An injunction restraining the Respondent from causing, inducing or aiding any relevant ADE to assess the wages of the Applicant or any Group Member under BSWAT.
3. An order that the Respondent cause, aid or induce the relevant ADEs to assess the wages of the Applicant and the Group Members using the Supported Wage System or some other wage assessment tool which tests only their productivity.
4. An order that the Commonwealth pay compensation to be assessed, to the Applicant and each Group Member for loss and damage suffered because of the unlawful discrimination.
5. Interest.
6. Costs.
7. Such further or other orders as the Court holds to be just.

### **Accompanying documents**

The following documents accompany this Originating Application:

1. A copy of the original complaint to the Australian Human Rights Commission; and
2. The notice of termination of complaint given by the President of the Australian Human Rights Commission.



**Amended Common questions within the meaning of section 33H of the Federal Court Act 1976**

Note: The following expressions have the meaning given in the Second Further Amended Statement of Claim filed 21 December 2015: intellectual disability; non-intellectually disabled; Condition; irrelevant competencies attribute; scope attribute; interview attribute; abstract language attribute; all or nothing attribute. The expression "intellectually disabled" when applied to a person means a person with an intellectual disability.

1. Whether an intellectually disabled person was less likely than a non-intellectually disabled person to comply with the Condition ~~the use of Business Services Wage Assessment Tool (BSWAT) to assess wages paid by the relevant ADEs to the Applicant and the Group Members, was discriminatory in contravention of:~~  
     ~~section 6;~~  
     ~~section 15;~~  
     ~~section 24; or~~  
     ~~section 29;~~  
     within the meaning of  
     (a) section 6(c) on and before 4 August 2009; or  
     (b) section 6(1)(b) from 5 August 2009  
     of the Disability Discrimination Act 1992 (DDA).
  
2. ~~If the answer to 1 is yes, whether the Respondent caused, induced or aided the relevant ADEs within the meaning of s 122 of the DDA in so discriminating against the Applicant and the group members.~~
  
3. ~~If the answer to 2 is yes, w~~ Whether the Applicant and the Group Members have suffered loss and damage because of the imposition of the Condition ~~Respondent's contraventions of the DDA.~~
  
4. If the answer to 3 is yes, whether the Applicant and the Group Members are entitled to compensation on account of the imposition of the Condition ~~Respondent's contraventions of the DDA referred to in 3.~~



5. If the answer to 4 is yes, what is the proper measure of compensation to which the Applicant and the group members are entitled.
6. Whether the ~~use of an interview to assess core competencies~~ interview attribute pursuant to the BSWAT is such that intellectually disabled persons would find it harder than non-intellectually disabled persons to be assessed as competent.
7. Whether the ~~language of the questions used to assess core competencies pursuant to BSWAT~~ abstract language attribute is such that intellectually disabled persons would find it harder than non-intellectually disabled persons whose disability was not an intellectual disability to be assessed as competent.
8. Whether the all or nothing attribute is such that intellectually disabled persons would find it harder than non-intellectually disabled persons to be assessed as competent. requirement of BSWAT that a person be assessed as 0% competent in relation to a core competency for which the person had not answered all of the questions correctly is discriminatory in contravention of:

- a. ~~section 6;~~
- b. ~~section 15;~~
- c. ~~section 24; or~~
- d. ~~section 29;~~
- e. ~~—~~

of the DDA.

9. ~~Whether the requirement of BSWAT that a person be assessed as 0% competent in relation to a core competency for which the person was observed in the workplace to satisfy all elements of that core competency but did not answer all questions for that core competency in the required manner is discriminatory in contravention of:~~

- a. ~~Section 6;~~
- b. ~~section 15;~~
- c. ~~section 24; or~~
- d. ~~section 29;~~



of the DDA.

10. Whether the irrelevant competencies attribute is such that intellectually disabled persons would find it harder than non-intellectually disabled persons to be assessed as competent. the requirement of BSWAT that an employee of an ADE be assessed against an industry competency where the employee being assessed is never required as part of his or her employment to do a task relevant to that industry competency, but any other employee in the workplace or any supervisor does a task relevant to that industry competency, is discriminatory in contravention of:

- a. ~~section 6;~~
- b. ~~section 15;~~
- c. ~~section 24; or~~
- d. ~~section 29;~~

of the DDA.

11. ~~Whether the requirement of BSWAT that an employee of an ADE be assessed against four industry competencies before the disabled employee can achieve the full wage of the relevant grade referable to the employee's job under the applicable Award rate of Grade 1 of the relevant award, although a non-disabled employee at Grade 1 the same grade of the relevant award is not required to be assessed against any industry competencies at all in order to achieve the full Grade 1 wage rate for that grade, is discriminatory in contravention of:~~

- a. ~~section 6;~~
- b. ~~section 15;~~
- c. ~~section 24; or~~
- d. ~~section 29;~~

of the DDA.

12. Whether the scope attribute is such that intellectually disabled persons would find it harder than non-intellectually disabled persons to be assessed as competent.



13. If the Applicant and the group members have been discriminated against by the respective employers by reason of the imposition of the Condition, as alleged in the Second Further Amended Statement of Claim, whether the Respondent has caused, induced or aided those employers within the meaning of s.122 of the DDA in so discriminating against the Applicant and the group members.
14. If the answer to 13 is yes, whether the Respondent is also to be taken as having discriminated against the Applicant and the group members in the same way.
15. Whether the provision of supported employment services by employing ADEs constitutes:
  - a. the provision of a "service" within the meaning of that term in s 24 of the DDA;
  - b. the performance of a function under a Commonwealth law for the purposes of a Commonwealth program within the meaning of s 29 of the DDA; and
  - c. the exercise of a power under a Commonwealth law or for the purposes of a Commonwealth program within the meaning of s 29 of the DDA.

### **Applicant's details**

The Applicant's relationship to the Respondent is an employee of High Point Industries, an Australian Disability Enterprise, and his wage rate has been assessed using BSWAT.

The Applicant is over 18 years, but as a person under a disability seeks to sue by his litigation representative Kairstien Wilson ~~Claudine Duval, who is his mother.~~

### **Applicant's address**

The Applicant's address for service is:

Place: c/- Maurice Blackburn, Level 10, 456 Lonsdale St, Melbourne, Victoria 3000.

Email: c/- kmthomas@mauriceblackburn.com.au

The Applicant's address is 21 Allan Street, Aberfeldie, Victoria.

### **Service on the Respondent**

It is intended to serve this application on the Respondent.

Date: 21 December 2015



*Maurice Blackburn.*

Signed by **Maurice Blackburn**  
Lawyers for the Applicant