

## Federal age discrimination law finally coming of age: *Gutierrez v MUR Shipping Australia*

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The Age Discrimination Act 2004 (Cth) has been in place for nearly 20 years. And yet, there has never been a successful case reported under the Act, at least in the context of employment.<sup>1</sup> This does not mean that there has never been a successful *claim* under the Act; with extensive conciliation in equality law, it is likely that most claims are conciliated or withdrawn before proceeding to a public court hearing.<sup>2</sup> At the same time, compared to other protected grounds – like sex, race, and disability – age discrimination law has led to few cases at the federal level, with claimants struggling to establish a successful claim.<sup>3</sup> While age discrimination cases have been brought successfully under state and territory discrimination law, and industrial laws (like the Fair Work Act 2009 (Cth) (FW Act)), success in the age discrimination jurisdiction remains exceptional.<sup>4</sup>

Despite (or, perhaps, because of) this lack of age discrimination judgments, the Australian Human Rights Commission has found age discrimination to be prevalent and pervasive,<sup>5</sup> being experienced by a majority of adults, across the age spectrum.<sup>6</sup> Australia is not alone: the World Health Organisation describes ageism globally as 'prevalent, ubiquitous and insidious because it goes largely unrecognised and unchallenged'.<sup>7</sup>

This status quo was fundamentally disrupted in 2021, with the first successful case handed down under the Age Discrimination Act 2004 (Cth): *Gutierrez v MUR Shipping Australia*.<sup>8</sup> The remedy awarded was successfully appealed by the claimant to the Federal Court of Australia in 2023. This case note considers these dual cases, their implications for age discrimination law and for remedies in equality law more broadly.

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<sup>1</sup> T MacDermott, 'Resolving Federal Age Discrimination Complaints: Where Have All the Complainants Gone?' (2013) 24 *ADJR* 102; A Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42 *SydLR* 1.

<sup>2</sup> A Blackham and D Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *AJLL* 253; A Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement*, Oxford University Press, Oxford, 2022.

<sup>3</sup> MacDermott, above n 1; Blackham, above n 1.

<sup>4</sup> See the summary in Blackham, above n 1.

<sup>5</sup> Australian Human Rights Commission, *National Prevalence Survey of Age Discrimination in the Workplace: The Prevalence, Nature and Impact of Workplace Age Discrimination amongst the Australian Population Aged 50 Years and Older*, AHRC, Sydney, 2015.

<sup>6</sup> Australian Human Rights Commission, *What's Age Got to Do with It?*, AHRC, Sydney, 2021 at <<https://humanrights.gov.au/our-work/age-discrimination/publications/whats-age-got-to-it-2021>> (accessed 21 September 2023).

<sup>7</sup> World Health Organization, *Global Report on Ageism*, WHO, Geneva 2021, at <<https://iris.who.int/bitstream/handle/10665/340208/9789240016866-eng.pdf>> (accessed 21 September 2023) at ix.

<sup>8</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56 (1 December 2021).

## The facts in *Gutierrez*

Mr Gutierrez was a long-standing employee of MUR Shipping, working for the company and its predecessors since 1993 as an accountant (by 2018, as the company's Chief Accountant).<sup>9</sup> Mr Gutierrez's evidence was that he wished to work until the age of 75.<sup>10</sup> However, in February 2018, Mr Gutierrez alleged that Mr Getty (the then Managing Director of MUR Shipping) instructed him that the company had a retirement age of 65.<sup>11</sup> Mr Gutierrez (then aged 68) was asked to tell the company when he would retire.<sup>12</sup> Under pressure, Mr Gutierrez indicated a retirement date of July 2019<sup>13</sup> (later extended to September 2019, his 70<sup>th</sup> birthday).<sup>14</sup> Mr Gutierrez further alleged that MUR Shipping employed Ms Fernandes in April 2018 as his replacement. In July 2018, Mr Gutierrez was informed that, from January 2019, his employment would be shifted from an open-ended contract to a fixed-term, annual contract,<sup>15</sup> with an expectation that he would train Ms Fernandes as his replacement. This arrangement was summarised in a contemporaneous email from Mr Gutierrez to Mr Smith, the new Managing Director;<sup>16</sup> MUR Shipping never sought to correct any statements in that email as being inaccurate. After receiving legal advice, Mr Gutierrez conveyed to MUR Shipping that he saw this as a repudiation of his contract,<sup>17</sup> which he accepted. Mr Gutierrez sought an apology and damages in excess of \$400,000, including for psychiatric injury, pain and suffering, and economic loss.

MUR Shipping denied telling Mr Gutierrez that it had a fixed retirement age; or that Ms Fernandes was employed as Mr Gutierrez's replacement.<sup>18</sup> MUR Shipping argued that it did not terminate or repudiate Mr Gutierrez's contract; it was his decision to resign.

### At first instance

At first instance, Judge Driver held that MUR Shipping unlawfully discriminated against Mr Gutierrez on the basis of age. Judge Driver recognised that Mr Getty, as Managing Director of MUR Shipping, was concerned about succession planning;<sup>19</sup> yet, while Ms Fernandes was employed by MUR Shipping as an administrative officer,<sup>20</sup> she was not engaged as an accountant, or to take over Mr Gutierrez's role, at least at that stage.<sup>21</sup> Regardless, there was still evidence of unlawful age discrimination in proposing to shift Mr Gutierrez from an ongoing contract to a fixed-term employment contract.

Judge Driver found there to be two types of proscribed action under the Age Discrimination Act 2004 (Cth). Section 18(2) of the Act says:

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<sup>9</sup> Ibid, at [35].

<sup>10</sup> Ibid, at [36].

<sup>11</sup> Ibid, at [37].

<sup>12</sup> Ibid, at [37].

<sup>13</sup> Ibid, at [37].

<sup>14</sup> Ibid, at [122].

<sup>15</sup> Ibid, at [39].

<sup>16</sup> Ibid, at [39].

<sup>17</sup> Ibid, at [42].

<sup>18</sup> Ibid, at [120].

<sup>19</sup> Ibid, at [125].

<sup>20</sup> Ibid, at [130]–[134].

<sup>21</sup> Ibid, at [134].

It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's age:

(a) in the terms or conditions of employment that the employer affords the employee; or

...

(d) by subjecting the employee to any other detriment.

In this case, in relation to s 18(2)(a), Judge Driver found that Mr Gutierrez's existing terms of employment were to be changed to his detriment, by terminating his ongoing contract and placing him on a fixed term contract.<sup>22</sup> In relation to s 18(2)(d), Judge Driver found that Mr Gutierrez was:

disrespected in his employment, given his long and loyal period of employment. His own word was not accepted as to his retirement. A fixed term contract was to be imposed. Further, Mr Gutierrez was demeaned in his employment by being called upon to train his replacement.<sup>23</sup>

This treatment was held to be because of Mr Gutierrez's age. As Judge Driver summarised:

The logical comparator is Ms Fernandes. She was employed with the expectation that she would take over the position of Mr Gutierrez when he retired. MUR Shipping pressed Mr Gutierrez to nominate a firm retirement date. Notwithstanding that he complied, MUR Shipping proposed to deprive him of his agency as to his own future by replacing his ongoing employment contract with a fixed term contract. Further, he was expected to train his replacement. In these circumstances I have no difficulty in finding that Mr Gutierrez was treated less favourably than Ms Fernandes. Further, the less favourable treatment related specifically to Mr Gutierrez's age.<sup>24</sup>

MUR Shipping argued that, regardless, this treatment did not cause any loss. Judge Driver rejected this argument, finding that the treatment did cause hurt and offence, which drove Mr Gutierrez's decision to resign.<sup>25</sup> However, Judge Driver did not accept that MUR Shipping caused Mr Gutierrez's employment to end: rather, he *chose* to resign.<sup>26</sup> 'Mr Gutierrez chose to resign his employment when there was no need to do so. He could have continued in his employment, at least until the end of 2018 and probably until his intended retirement date at his 70th birthday.'<sup>27</sup>

There was therefore no causal link between the unlawful discrimination and any economic loss.<sup>28</sup> Further, while Mr Gutierrez 'did suffer an adjustment disorder'<sup>29</sup> as a result of the discriminatory treatment – which the Judge classed as 'mild'<sup>30</sup> – Judge Driver found Mr Gutierrez was still able to work. In terms of remedy, Judge Driver ordered MUR Shipping to provide Mr Gutierrez with an apology, and damages for non-economic loss of \$20,000 plus

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<sup>22</sup> Ibid, at [149].

<sup>23</sup> Ibid, at [149].

<sup>24</sup> Ibid, at [146].

<sup>25</sup> Ibid, at [152].

<sup>26</sup> Ibid, at [111].

<sup>27</sup> Ibid, at [176]. Noting, though, that Mr Gutierrez's evidence was that he originally wished to work until age 75: *ibid*, at [36].

<sup>28</sup> Ibid, at [155].

<sup>29</sup> Ibid, at [154].

<sup>30</sup> Ibid, at [162].

interest.<sup>31</sup> Alternative arguments, for breach of employment contract and redundancy payments, were rejected.<sup>32</sup>

While Mr Gutierrez's claim was successful, the damages awarded were dwarfed by the costs incurred in bringing proceedings: in later media reporting, those legal costs were cited as being around \$150,000.<sup>33</sup> Mr Gutierrez also faced the prospect of being required to pay MUR Shipping's costs, given the low damages awarded.<sup>34</sup> This implies that a *Calderbank* offer was made during the proceedings, exposing Mr Gutierrez to paying MUR Shipping's costs after the date of the offer, if his refusal of the offer was seen to be unreasonable.<sup>35</sup> By contrast, given Mr Gutierrez's claim was successful, without a *Calderbank* offer, costs would normally follow the event in the federal discrimination jurisdiction (that is, Mr Gutierrez would likely receive his costs on a party-party basis).<sup>36</sup>

## On appeal

Understandably, Mr Gutierrez appealed the initial decision – on the question of remedy – to the Federal Court of Australia. Burley J upheld the appeal, finding legal errors in Judge Driver's assessment of damages.<sup>37</sup> On appeal, Mr Gutierrez was awarded \$90,000 in general damages,<sup>38</sup> and economic loss of \$142,215.56 plus interest. MUR Shipping was required to pay Mr Gutierrez's costs of the appeal.

### General damages

Mr Gutierrez argued that the initial decision erred in finding that his adjustment disorder was 'mild'.<sup>39</sup> There was uncontested expert evidence (from the claimant's forensic psychiatrist) which did not say the adjustment disorder was 'mild'; and there was evidence from both the psychiatrist and Mr Gutierrez that he was unable to work.<sup>40</sup> The initial decision also failed to take into account the evidence of Mrs Gutierrez regarding impact of the discrimination on Mr Gutierrez.<sup>41</sup> There was no explanation or reasoning as to why the judgment departed from this evidence.<sup>42</sup> It was accepted on appeal, then, that this approach was inadequate:

In my respectful view, the reasons of the primary judge do not elucidate why the opinion of [the claimant's psychiatrist] as to Mr Gutierrez's incapacity to work was implicitly rejected. It is not apparent to me that the primary judge grappled as he ought to have with the evidence of [the claimant's psychiatrist]. The obligation to give reasons does not require that the primary

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<sup>31</sup> *Ibid*, at [177].

<sup>32</sup> *Ibid*, at [113].

<sup>33</sup> K Pender, 'Landmark Win in Age Discrimination Case', *The Saturday Paper*, 10 June 2023, at <<https://www.thesaturdaypaper.com.au/news/law-crime/2023/06/10/landmark-win-age-discrimination-case>> (accessed 21 September 2023).

<sup>34</sup> *Ibid*.

<sup>35</sup> *Calderbank v Calderbank* [1975] 3 All ER 333. In the federal discrimination law context, see, eg, *Kiefel v State of Victoria* [2014] FCA 411 (30 April 2014).

<sup>36</sup> Federal Circuit Court of Australia Act 1999 (Cth) s 79; replaced by the Federal Circuit and Family Court of Australia Act 2021 (Cth) s 214.

<sup>37</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399 (4 May 2023).

<sup>38</sup> *Ibid*, at [5].

<sup>39</sup> *Ibid*, at [39].

<sup>40</sup> *Ibid*, at [39], [55].

<sup>41</sup> *Ibid*, at [41].

<sup>42</sup> *Ibid*, at [60].

judge mention and analyse every aspect of the evidence, but it must be sufficient to provide a basis for the decision. That basis is not apparent here.<sup>43</sup>

Burley J, in reassessing damages, accepted the evidence of the claimant’s psychiatrist, Mr Gutierrez and Mrs Gutierrez, to find that:

the effect of this evidence is to paint a picture of a man who has suffered considerable loss of amenity of life, including a diagnosed inability to work, loss of enjoyment of social aspects of his life, and an adjustment disorder with depression and anxiety. The primary judge found, and I would in any event find, that a material cause of this was the Age Discrimination as found.<sup>44</sup>

This was the case even if Mr Gutierrez ‘was found to have decided to terminate his contract of employment’;<sup>45</sup> the age discrimination was still *a* cause of this loss.<sup>46</sup>

### Economic loss

At first instance, no damages were awarded for economic loss, on the basis that Mr Gutierrez resigned from this employment: ‘Mr Gutierrez has not suffered any economic loss caused by that discrimination because he chose to resign his employment when there was no need to do so.’<sup>47</sup> Even if accepting that Mr Gutierrez’s resignation was voluntary, though, Burley J held that an award could be made for economic loss:

The finding of the primary judge that Mr Gutierrez had brought about the cessation of his employment by incorrectly concluding that MUR had repudiated his contract ought not to have been the end of the enquiry. Had the primary judge correctly considered the evidence of Dr Kaplan and Mrs and Mr Gutierrez in relation to the Age Discrimination as Found, then he ought to have turned his mind to the fact that Mr Gutierrez was unable to work as a result of that discrimination. ... even though the primary judge found that Mr Gutierrez was not forced out of his employment with MUR as a matter of contract law, there is a sufficient causal link between MUR’s unlawful discriminatory conduct and Mr Gutierrez’s economic loss to warrant an award in that respect also.<sup>48</sup>

There was evidence that Mr Gutierrez was unable to work following the age discrimination;<sup>49</sup> Burley J therefore expressed a provisional view that Mr Gutierrez should be awarded economic loss of \$142,215.56 plus interest.<sup>50</sup> Burley J later confirmed this award.<sup>51</sup>

### **Implications**

#### A lightning rod decision

*Gutierrez v MUR Shipping* could come to be seen as a ‘lightning rod’ case, encouraging other claimants – and practitioners – to pursue claims of age discrimination in the federal courts.<sup>52</sup>

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<sup>43</sup> Ibid, at [63] (references omitted).

<sup>44</sup> Ibid, at [89].

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56 (1 December 2021), at [111].

<sup>48</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399 (4 May 2023), at [97]–[98].

<sup>49</sup> Ibid, at [100].

<sup>50</sup> Ibid, at [103].

<sup>51</sup> *Gutierrez v MUR Shipping Australia Pty Limited (No 2)* [2023] FCA 567 (1 June 2023).

<sup>52</sup> Blackham, above n 2, at 211.

Indeed, if a claim is seen as financially worthwhile, this may help rebalance the perceived ‘weight’ of claiming in the federal courts.<sup>53</sup> Claimants typically weigh their chances of success – and the likely benefits of success (here, the potential quantum of damages) – against the costs of claiming, including the financial and emotional costs, time, risk of retaliation, perceived stigma, and stress of proceedings.<sup>54</sup> Mr Gutierrez’s success on appeal in increasing his damages – by more than a factor of 10 – will likely lead to future claimants being more willing to pursue a claim of age discrimination in the federal jurisdiction. The (financial) benefits may come to be seen as outweighing the costs of claiming.

This case is also a warning for employers – like MUR Shipping – concerned with ‘succession planning’. Succession planning is an important part of good organisational management. However, it cannot be conducted in a way that is discriminatory or which deprives employees of individual agency. A better approach, which MUR Shipping should have adopted, is to ask all employees – of all ages – about their future work aspirations and plans, as in annual performance discussions. Retirement is something many employees aspire to; conversations about retirement can be an important part of workforce planning. What distinguishes this case from good practice is fairly blatant: moving workers over an (unlawful) organisational ‘retirement age’ to a fixed term contract; compelling older workers to nominate a retirement date; and appointing potential replacements, ostensibly in anticipation of that retirement date, without consultation or discussion. While MUR Shipping is not alone in making these departures from what is good – and lawful – practice<sup>55</sup> – this case should be a warning shot for employers who persist in enforcing retirement ages for their staff and partners.

### The need for (written) evidence

This case is perhaps unusual, in that the age discrimination claim was not hampered by features of discrimination law that can be particularly problematic for claimants:<sup>56</sup> the comparator requirement, and burden of proof, did not appear difficult for Mr Gutierrez to surmount, at least in relation to some allegations of discrimination. That said, it appears that Mr Gutierrez’s claim – and its success – hinged on his email sent to the managing director, summarising a verbal conversation, which was not contradicted or corrected by MUR Shipping. Otherwise, Judge Driver largely rejected the alleged age discrimination put forward in Mr Gutierrez’s claim.

This illustrates, then, the need for compelling – often written – evidence to establish a successful claim of age discrimination.<sup>57</sup> This is consistent with previous studies of age discrimination cases in Australia: in a study of all 108 Australian age discrimination cases relating to employment to 2017, I concluded that ‘The key common factor across the successful substantive [age discrimination] decisions was compelling evidence of discrimination’, with

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<sup>53</sup> Ibid, at 142–3.

<sup>54</sup> Ibid.

<sup>55</sup> See, eg, H Wootton and E Tadros, ‘EY Drops Requirement for Partners to Retire at 60’, *Australian Financial Review*, 7 August 2020, at <<https://www.afr.com/companies/professional-services/ey-drops-requirement-for-partners-to-retire-at-60-20200806-p55j2w>> (accessed 21 September 2023); ‘KPMG Dumps Retirement Age Rules for Partners’, *Australian Financial Review*, 31 March 2021 at <<https://www.afr.com/companies/professional-services/kpmg-dumps-retirement-age-rules-for-partners-20210331-p57fpp>> (accessed 21 September 2023); H Wootton, ‘Deloitte Expects Partners Will Retire at 62’, *Australian Financial Review*, 9 February 2021, at <<https://www.afr.com/companies/professional-services/deloitte-admits-it-partners-are-expected-to-retire-at-62-20210208-p570jd>> (accessed 21 September 2023).

<sup>56</sup> See, eg, Blackham, above n 1; Blackham, above n 2.

<sup>57</sup> Blackham, above n 1.

age often expressly cited as the reason for the treatment, and often in writing or backed by witnesses.<sup>58</sup> It is also reflected in the later, successful FW Act adverse action case of *ABCC v Corestaff WA Pty Ltd*,<sup>59</sup> which was supported by a ‘smoking gun’ email expressly citing age as the reason for the treatment.<sup>60</sup> What is unusual about age discrimination – as compared to other grounds of discrimination – is that ‘smoking gun’ evidence often still emerges in these cases; some employers are still willing to explicitly cite age as the reason for adverse treatment, reflecting the ongoing social acceptance of age-based treatment. Over time, though, this is likely to further decline, as age discrimination becomes more subtle and covert. A challenge for judicial decision-makers going forward, then, is to develop a more sophisticated understanding of age discrimination, such that claims can be successful without such blatant evidence.

### Costs and the federal jurisdiction

*Gutierrez* also illustrates the significant impact of costs on claimants and their decision making. One reason why claimants may not use federal discrimination law is due to the risk of adverse costs orders; by contrast, under state and territory discrimination law, and under industrial law, parties tend to bear their own costs.<sup>61</sup> State, territory and industrial tribunals also tend to be lower-cost jurisdictions than the federal courts. If Mr Gutierrez had not faced a significant legal bill, and the prospect of being required to pay MUR Shipping’s costs, it is unlikely this case would have been appealed. While Mr Gutierrez’s appeal might have broader public benefits, it is unreasonable to expect individuals to bear this burden of effecting systemic change.

This emphasises, then, the importance of the review being conducted by the federal Attorney-General’s Department into costs in the federal discrimination jurisdiction.<sup>62</sup> This review was prompted by the Australian Human Rights Commission’s *Respect@Work* report, which found that the risk of an adverse costs order was a significant ‘disincentive’ to bringing a claim in the federal jurisdiction, and recommended aligning costs in discrimination law to provisions under the FW Act.<sup>63</sup> It remains to be seen how costs are reformed in the federal jurisdiction; what is clear, though, is that the current system is not supporting claimants to enforce their rights.

### Resigning from discriminatory environments

On appeal, Mr Gutierrez did not challenge the finding that he voluntarily resigned from MUR Shipping.<sup>64</sup> Ultimately, it was inconsequential to the age discrimination claim whether Mr Gutierrez resigned or was (constructively) dismissed; age discrimination was still a cause of Mr Gutierrez’s damage and loss.<sup>65</sup> What this finding does imply, though, is an expectation that

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<sup>58</sup> *Ibid*, at 10–11.

<sup>59</sup> *ABCC v Corestaff WA Pty Ltd* [2020] FCA 893 (22 June 2020).

<sup>60</sup> “[H]owever he [sic] age is a concern - 70 years old.”: *ibid*, at [37]; “no joy with the role at Gumala due to your age mate.”: *ibid*, at [39].

<sup>61</sup> Blackham, above n 2, at 144.

<sup>62</sup> Attorney-General’s Department, *Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws*, Canberra, February 2023, at <[https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/user\\_uploads/discussion-paper-review-appropriate-cost-model-commonwealth-anti-discrimination-laws.pdf](https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/user_uploads/discussion-paper-review-appropriate-cost-model-commonwealth-anti-discrimination-laws.pdf)> (accessed 21 September 2023).

<sup>63</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 507 <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>> (accessed 21 September 2023). See FW Act s 570.

<sup>64</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399 (4 May 2023) at [49].

<sup>65</sup> Though he may have been eligible for other remedies if he was dismissed.

claimants remain in toxic, discriminatory work environments. Despite MUR Shipping making its discriminatory intent clear, the trial court found that Mr Gutierrez could continue working there; at least until MUR Shipping eventually (unlawfully) would have compelled him to retire. This seems a deeply unsatisfactory state of affairs. Indirectly requiring claimants to continue to endure a discriminatory workplace, while anticipating further discrimination in the future, is likely to exacerbate the mental and physical toll of workplace discrimination. This runs contrary to work health and safety legislation, which is increasingly concerned with the psychosocial hazards and risks of work.<sup>66</sup> Classing a resignation as ‘voluntary’, with the Sword of Damocles of dismissal ever-present, seems to mis-represent the reality of the position Mr Gutierrez found himself in. And yet, this situation was held to not meet the high bar for establishing constructive dismissal.<sup>67</sup> This indicates, perhaps, the limits of discrimination law and labour law for claimants who remain in discriminatory workplaces.

Further, Judge Driver saw Mr Gutierrez as able to continue working, which justified the lack of compensation for economic loss. This ignores the very real difficulties older workers can face in finding employment, particularly in their 60s and 70s. Indeed, in a survey of 297 human resource (HR) professionals conducted in 2023, the Australian HR Institute found that 18% of HR professionals had an upper age above which they ‘definitely’ or ‘probably’ will not recruit staff.<sup>68</sup> Only 25% of respondents reported being open to hiring people aged 65 and over ‘to a large extent’;<sup>69</sup> conversely, 17% reported that they were not open to hiring people aged 65 and over ‘at all’,<sup>70</sup> even when facing recruitment difficulties. This is reflected in Mr Gutierrez’s experience – as reported later, he has not found work since resigning from MUR Shipping: “‘What work can a 73-year-old get?’” he asks.<sup>71</sup>

### Devaluing age discrimination?

At first instance, Judge Driver distinguished the – higher – damages awarded in cases such as *Richardson v Oracle Corporation Australia Pty Ltd*<sup>72</sup> and *Nationwide News Pty Ltd v Naidu*,<sup>73</sup> in part, on the basis of ‘the significant findings of the conduct towards the victim’.<sup>74</sup> Implicitly, this devalues Mr Gutierrez’s experiences of age discrimination, seeing it as less significant or ‘valuable’ than experiences of, say, sexual harassment. This approach was explicitly rejected on appeal, with Burley J holding that:

to suggest, as the primary judge appears to, that the seriousness of the conduct of a defendant towards a victim, separately from a consideration of the damage caused by that conduct, is relevant to the assessment of general damages reflects error. At the point of the assessment of damages, the question is the amount which can fairly be regarded as reasonable compensation for the injuries and disabilities which a plaintiff has sustained, not the manner in which the harm was caused or egregiousness by which it was inflicted.<sup>75</sup>

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<sup>66</sup> See, eg, the Work Health and Safety Regulations 2011 (Cth), amended by the Work Health and Safety Amendment (Managing Psychosocial Risk and Other Measures) Regulations 2022 (Cth).

<sup>67</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56 (1 December 2021) at [165]–[168].

<sup>68</sup> Australian HR Institute, *Employing and Retaining Older Workers*, Melbourne, May 2023, at <<https://www.ahri.com.au/wp-content/uploads/230427-Employing-Older-Workers-Report.pdf>> (accessed 21 September 2021) at 5, 12.

<sup>69</sup> *Ibid.*, at 5, 22.

<sup>70</sup> *Ibid.*

<sup>71</sup> Pender, above n 33.

<sup>72</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014).

<sup>73</sup> *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 (21 December 2007).

<sup>74</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56 (1 December 2021) at [157].

<sup>75</sup> *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399 (4 May 2023) at [52] (references omitted).



That is, the issue is the harm caused, not its manner of infliction.<sup>76</sup>

It raises the question, though, of to what extent was this case limited or viewed through a lens of internalised age discrimination?<sup>77</sup> There is a risk that age discrimination against others might be seen as less harmful, or more acceptable, due to internalised age discrimination<sup>78</sup> and the normative acceptance of retirement ages among and for the judiciary.<sup>79</sup> This might explain the devaluing of age discrimination, and the expectation to remain in a discriminatory workplace. Tackling our assumptions and stereotypes of age is a complex process; in his successful claim, Mr Gutierrez has hopefully provided us with one tool to strengthen this process. This case should prompt us all to challenge our own assumptions and stereotypes about age, ageing and the utility of age discrimination law.

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<sup>76</sup> Though this may be relevant to assessing aggravated damages: see further N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law*, 3<sup>rd</sup> edn, Sydney, The Federation Press, 2018, pp 825–6.

<sup>77</sup> M van der Horst, ‘Internalised Ageism and Self-Exclusion: Does Feeling Old and Health Pessimism Make Individuals Want to Retire Early?’ (2019) 7(3) *Social Inclusion* 27; S Vickerstaff and M van der Horst, ‘Embodied Ageism: “I Don’t Know If You Do Get to an Age Where You’re Too Old to Learn”’ (2022) 62 *Journal of Aging Studies* 101054.

<sup>78</sup> M Formosa, ‘Manifestations of Internalized Ageism in Older Adult Learning’ (2021) 90 *University of Toronto Quarterly* 169 at 170–2.

<sup>79</sup> A Blackham, ‘Judges and Retirement Ages’ (2016) 39 *MULR* 738.



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