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Travel Sisters (Anti-Discrimination Exemption) [2009] VCAT 2427 (17 November 2009)

Last Updated: 24 November 2009

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT REFERENCE NO. A189/2009

CATCHWORDS

Application for exemption under section 83 [Equal Opportunity Act 1995](#) – Charter of Human Rights and Responsibilities applied – application dismissed.

APPLICANT	Travel Sisters
INTERESTED PARTY	Victorian Equal Opportunity & Human Rights Commission
WHERE HELD	Melbourne
BEFORE	Her Honour Judge Harbison Vice President
HEARING TYPE	Exemption Hearing
DATE OF HEARING	21 October 2009
DATE OF ORDER	17 November 2009
CITATION	Travel Sisters (Anti-Discrimination Exemption) [2009] VCAT 2427

ORDER

This application is dismissed.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT

APPEARANCES:

For Applicant Ben Mahoney
For Interested Party: Chelsey Bell, solicitor
Tessa van Dwyn, solicitor

REASONS

INTRODUCTION AND BACKGROUND

1. Erin Maitland presently works on her own behalf, making a living by trading items online through eBay.
2. However, she loves to travel and to organise trips for others. In the past she has worked as a tour guide leader for intellectually disabled people, and she has organised many tours on behalf of herself and her family and friends. She has also travelled and lived overseas extensively.
3. She has decided that she would like to pursue a new business enterprise. She wishes to organise travel tours to conduct a business of arranging tours for women only. She does not have a travel agent's licence, and anticipates that she will need to work through a licensed travel agent in organising these tours and conducting her business.
4. She has applied to this Tribunal for an exemption under s 83 of the *Equal Opportunity Act 1995*. If she does not obtain an exemption, then she would be in breach of the *Equal Opportunity Act* if she were to advertise tours for women only and to exclude men from the tours.
5. Erin has thought a great deal about her proposed plan, and has looked at previous decisions of this Tribunal in which exemptions have been granted for businesses similar to the one she wishes to establish.
6. In particular, she has noticed a decision of *Morris [2007] VCAT 380*, heard approximately two years ago, in which this Tribunal granted an exemption for Hayley Morris to enable that applicant to offer and arrange tours for women only and to advertise that fact.
7. A major difference between this application and the application that was successful in the matter of *Morris* is that Ms Maitland has not yet established her business and so has no experience of how her proposal will work out in practice. She also has no established clientele to offer support to this application.

Factors relied on in support of this application

8. Erin swore an affidavit in support of this application. In that affidavit she set out the way in which she considered the tour business would operate and the reasons why she thought the exemption should be granted.
9. Many of the reasons on which she relied were very similar to the reasons which were held sufficient to justify the grant of an exemption in the case of *Morris*. They included the following:

(1) Security. She deposed that she believed that women who were frightened of or uncomfortable with travelling alone for personal security reasons would feel safe in a group.

(2) Common interests. She deposed that her tours would be tailored to interests common to women, rather than men, for example, cooking, shopping, personal care and craft.

(3) Partner reassurance. She deposed that she believed that male partners or spouses who were not able or willing to travel with their partners could feel reassured that their partner would not be travelling with other males, and therefore may be more supportive of the women undertaking the experience.

(4) Religious and cultural beliefs. She deposed that there are many women who for religious, cultural or other reasons are unable to, or feel uncomfortable in an environment of mixed men and women.

(5) Past experiences. She deposed that there would be groups of women who had suffered domestic violence abuse or sexual crimes of violence at the hands of men and that travelling in mixed company including unfamiliar men may well not be an option, or would be extremely difficult and uncomfortable.

10. She has had no personal experience of the issues described above. She has compiled the list taking into account the issues identified in *Morris*, and after talking the proposal through with friends and family. She described the environment that she was trying to create as being comfortable, relaxed and safe and offering women the chance to be themselves and relax and enjoy the time they are spending on holidays.
11. In the case of *Morris*, there was evidence before the Tribunal from approximately 20 people who had expressed strong interest in the proposal. There was also evidence that the applicant would continue to provide her previous service of mixed tours and that the addition of women only tours was an additional service rather than a service which excluded males.
12. In *Morris*, the Tribunal in granting the exemption described the application as a unique initiative, giving to women an opportunity to travel which they may not have otherwise had if that initiative was not available.
13. The lack of previous experience or confirming material in this application is one significant difference between this application and the matter of *Morris*. However, the most significant difference appears to me to be the fact that since the decision in *Morris* was made, this Tribunal has become required to assess exemption applications in the light of the *Charter of Human Rights and Responsibilities*.

Submissions of the Human Rights and Equal Opportunity Commission

14. The Human Rights and Equal Opportunity Commission was represented at the hearing of this matter and filed submissions in relation to the exemption.
15. The Commission opposed the grant of the exemption in this case. In doing so, it observed as follows:

“In considering an exemption application the Tribunal must do so in the light of the Charter. In particular, the Commission referred to the observations of Justice Bell in *Lifestyle Communities* (No. 3) [2009] VCAT 1869 at paragraph 96 that the purpose of the Equal Opportunity Act did not permit the grant of exemptions in order to achieve convenient, economic and practical outcomes, but that the true purpose was to promote equal opportunity and prevent discrimination.”

16. In *Lifestyle Communities*, Justice Bell held, and it has been accepted in all later exemption cases, that in interpreting s 83 of the Equal Opportunity Act the Tribunal is acting as a public authority and thus must not act in a way which is incompatible with a human right or, in making its decision, fail to give proper consideration to a relevant human right.
17. The Commission identified the relevant human right applicable to the case before me as being the right to recognition and equality before the law. The Commission submitted that this right was central to the spirit and objectives of the Equal Opportunity Act and its importance should not be underestimated.
18. The Commission argued that in assessing the merits of Erin’s proposal the factors which she had put forward in support were not of the same weight or seriousness as the need to protect this right.
19. To comply with the Charter, I need to be satisfied that any limitation on the right of all Victorians to recognition and equality before the law must be reasonable, necessary, justified and proportionate.
20. The Commission pointed out that Victorian females typically interact with and alongside

- males in the provision of goods and services such as the service of a travel agency. The Commission noted that the applicant has not provided information demonstrating the importance of providing female-only services to ensure safe and secure environments, and suggested that more information was needed to establish the importance of that purpose.
21. The Commission argued that accommodating a mere preference by a section of the female community for women only tours was unlikely to be able to be characterised as promoting equal opportunity and assisting the prevention of discrimination.
 22. The Commission submitted that the Tribunal should not grant the exemption unless satisfied firstly that there was a demonstrable need for female-only services of this nature based on safety, security or other compelling considerations and secondly that there was persuasive evidence that the exclusion of males from the service would in fact secure the objectives of providing a safe and secure travel environment for females.
 23. The Commission characterised the evidence in support of the application as being "weak".
 24. The Commission pointed out that the limitation was extreme in that it allowed the applicant to breach the Act by refusing to offer services to males and that it was based upon stereotyping of men's behaviour, in that it was suggested that men would not like the types of travel service provided, and on women's reaction to the presence of men, in that it was suggested that women would feel intimidated by or uneasy in the presence of men.
 25. The Commission suggested that there are alternatives available to Erin to combat the difficulties she has referred to in her affidavit. She could take steps to enforce standards of conduct for persons accessing tours, select tailoring and spa facilities with separate male and female change rooms, or make arrangements to ensure privacy of participants, and encourage participants to report safety concerns. The Commission suggested these simple alternatives were far preferable to an incursion on our human rights.
 26. Finally, the Commission suggested that if in fact the applicant was correct about the appeal of these tours to women rather than men, her proposal may not be popular to men and therefore market forces would achieve the result that she required without the need to limit human rights by means of an exemption.

The Applicant's submissions in response

27. Ms Maitland addressed some of the issues raised by the Commission when she gave evidence on the hearing of this application. She quite properly conceded that she did not have any evidence to support the matters on which she relied. As she has not yet commenced her business, it is impossible for her to produce evidence of this description.
28. She also reminded me that the business proposed was very small, and she would not have the financial resources to obtain surveys or to produce any meaningful data about the need for a service such as this within the community. She suggested that the travel industry was very large and that I should be satisfied that there were many opportunities for mixed groups in tours. Her proposal would not detract from choice in the marketplace but would enhance choice for a very small group of women in the community.
29. She also suggested that there were several travel companies which were presently offering single sex tours without having gained the benefit of an exemption.
30. She candidly told me that even if the exemption was not granted she thought she would be able to provide a very similar service, as it was unlikely that males would be attracted to the types of tours she had in mind. Her difficulty is that she cannot at present legally advertise to attract the sort of women who might be interested, without gaining the benefit of this exemption.
31. She gave evidence that she had advertised this application in the travel pages of the Herald Sun, as the Tribunal had earlier required her to do, and that there has been no response at all to the application, suggesting that there is not a groundswell of opposition to her application from either other travel agents or from the public.

Conclusion

32. I have decided that this exemption should not be granted. Although I understand the difficulties faced by Erin in obtaining evidence of the need in the community for such a service, and its potential for the alleviation of disadvantage, it is my view that the human rights framework under which s 83 must now be interpreted requires me to apply a very stringent test in deciding whether or not an exemption should be granted.
33. I am only able to limit the right of all to equal protection without discrimination if I am satisfied that the limitation is such a reasonable limitation as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
34. Here, I am not satisfied on the evidence presented that the limitation is reasonable or necessary. There are several other measures which have been identified by the Commission which might achieve the reduction of disadvantage without requiring the exclusion of men from the tours proposed.
35. Further, I am not satisfied that the limitation is demonstrably justified or a proportionate limitation on the right to recognition and equality before the law. This is because there is no evidence presented to me as to the justification asserted, and there appear to be less restrictive means reasonably available to achieve the purpose.
36. Until this evidence is provided the most that can be said is that the applicant believes that her target group would prefer to participate in tours that were exclusively female. The grant of an exemption may well be convenient and practical to assist Erin in the establishment of her business, but it cannot presently be justified on human rights principles.
37. However, in refusing the application I recognise that the applicant has made the application in good faith, believing that she is well placed to provide a valuable community service, and that her proposal would have had minimal impact on the choice available in a very large and competitive industry.
38. I share her dismay that from time to time other travel operators openly advertise single sex services without appearing to recognise that such advertising is in breach of the law.
39. Although her application has been unsuccessful, she has by making the application protected herself from a potential claim of discrimination. Operators who conduct their businesses in ignorance or defiance of the law lay themselves open to a claim under the Act.
40. If in the future Erin is able to establish by credible evidence based on Charter considerations that an exemption is reasonable, necessary, justified and a proportionate limitation on the rights affected by her application, she may reapply to this Tribunal.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT

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