

Anti - Discrimination List

EXEMPTION

APPLICATION NO A221/2012

The Victorian Civil & Administrative Tribunal has considered an application pursuant to section 89 of the Equal Opportunity Act 2010 (the Act) by the State of Victoria - Department of Early Childhood Development (the applicant). The application for exemption is to enable the applicant to advertise for and employ only a male in the role of integration aide to work with a male student with disabilities (the exempt conduct).

UPON READING the material filed in support of this application, including affidavit material and having regard to submissions made by the applicant and the Victorian Equal Opportunity and Human Rights Commission, the Tribunal is satisfied that it is appropriate to grant an exemption from sections 16, 107 and 182 of the Act to enable the applicant to engage in the exempt conduct.

In granting this exemption the Tribunal noted:

- The school which the student attends currently employs one full time integration aide and four part time integration aides, all of whom are female. The school also employs three temporary part time aides who currently perform the role which is the subject of this application.
- At the end of 2012 the school will have a vacancy for one integration aide and it is proposed that a male be employed to work with the male student. The integration aide's role includes providing assistance with the curriculum and learning, communication with peers and students, preparation of materials, movement around the school and other physical care such as assisting with meals and medications and changing clothes. To preserve the student's dignity and decency, it is appropriate that the personal care and assistance he requires be provided by a male integration aide.
- Since the student was enrolled at the school in 2010, his aggressive sexualised behaviour has increased in frequency and severity. He has, on a number of occasions, grabbed and inappropriately touched female integration aides and has made inappropriate sexualised comments to those aides. Some of these incidents have been very serious. Other students who have witnessed this behaviour are also adversely affected. Since male integration aides have commenced working with the student, the situation has improved and having such an arrangement continue is considered to be in the best interests of the staff and other students and consistent with the school's duty to keep staff and students safe.
- Importantly, if the school is unable to employ a male integration aide, it is possible that the student will have limited access to education as he may be removed from classes and/or from time to time be suspended due to his behaviour. Other strategies to manage the behaviour have had limited effect although they will continue to be used. The applicant believes that, if a male integration aide is available to work with the student, he will have better access to educational opportunities, learn to manage in a co-educational setting and be able to better engage with his peers and teaching staff of both genders.
- No current exemption already applies to the exempt conduct. The Act contains exceptions relating to care of children in order to protect their physical, psychological or emotional wellbeing (section 25) and where there is a genuine occupational requirement for an employee to be of one gender (section 26). Given the range of responsibilities of the integration aide, I am not satisfied that all of the aspects of the role fall within either exception. Further, on the material available, I am not satisfied that the exception regarding compliance with other laws contained in section 75 applies. In the circumstances, in the absence of an exemption the exempt conduct may amount to prohibited discrimination.

- When making decisions about exemptions, the Tribunal is required to give proper consideration to relevant human rights as set out in the Charter of Human Rights and Responsibilities Act 2006 (Charter). Arguably, this exemption limits the right to equality and in particular the right to equal and effective protection against discrimination of women who would wish to be employed in the integration aide role. The right of children, without discrimination, to such protection as is in their best interests may also arise in respect of the student or other students at the school. I am satisfied that, in the circumstances discussed above, including the possible adverse affects on the student's education if the exemption is not granted, the limit imposed by this exemption is reasonable and justified under the Charter.

The Tribunal hereby grants an exemption from the operation of sections 16, 107 and 182 of the Act to enable the applicant to engage in the exempt conduct.

This exemption is to remain in force from the day on which notice of the exemption is published in the Government Gazette until 31 December 2015.

Dated this 19th day of December 2012


A Dea
Member

