IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION SAPC I 2010 0143
BETWEEN:

CHRISTIAN YOUTH CAMPS LIMITED (ACN 095 681 342)
First Applicant

MARK ROWE
Second Applicant

And

COBAW COMMUNITY HEALTH SERVICES LIMITED
First Respondent

VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMMISSION
Second Respondent

ADDITIONAL SUBMISSIONS OF THE SECOND RESPONDENT ON THE DISTINCTION BETWEEN MOTIVE AND REASON

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A. Introduction

1. These submissions address the issue of 'motive' and 'reason' with respect to a claim of 'direct discrimination'.

2. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) submits that:

   a. when considering whether the respondents' conduct constitutes unlawful discrimination, their motive is irrelevant. The task is determining the 'true basis' for their treatment of the complainants;

   b. in the absence of clear reason, a court may draw an inference about the reason for the treatment from the surrounding facts and evidence in order to make a finding that discriminatory conduct occurred because of a person's protected attribute; and

   c. evidence of a person's reasons for discrimination may be relevant to whether the attribute is the substantial reason for the treatment, but not determinative.

3. Ascertaining the reasons for the treatment informs whether the discrimination was 'on the basis of' an attribute under s 7(1) of the *Equal Opportunity Act 1995* (Vic) (**1995 Act**).

4. Determining whether a protected attribute is a reason for the less favourable treatment requires ascertaining the 'true basis' for the act or decision.[1] As noted by Dawson J in *Australian Iron & Steele Pty Ltd v Banovic* (**Banovic**),[2] this is not a subjective test.[3]

5. The reason for the treatment is a question of fact, which must be determined objectively having regard to all of the facts established in the proceedings. This requires investigation of the reasons which led the alleged discriminator to treat the person with the attribute less favourably. Even if a respondent's intentions are benign, the reason for the treatment may be inherently discriminatory and thereby reveal that an unlawful consideration formed the true basis of the act or decision.

B. Motive and intention not relevant

6. The distinction between 'reason' and 'motive' in anti-discrimination laws was considered by the High Court in *Purvis v New South Wales* (**Purvis**):[4]

> The reasoning in discrimination cases in this Court is consistent with the view that, while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.[5]

7. As s 10 of 1995 Act makes clear, when considering whether the respondents' conduct constitutes unlawful discrimination, their motive is irrelevant.

C. Inferring a reason for the treatment

8. Where the reason is not explicit or overt, a court may draw an inference about the reason for the treatment from the surrounding facts and evidence in order to make a finding that discriminatory conduct occurred because of a person's protected attribute.

9. To infer a discriminatory reason for conduct a court must be satisfied that there is no 'innocent and equally probable explanation that completely explains the conduct'.[6] This does not mean the court is required to accept the innocent explanations proffered by the respondent in all circumstances.[7] Rather, if an innocent explanation is equally or more probable on the basis of the evidence, an inference of unlawful discrimination cannot be drawn.[8]

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[1] *Australian Iron & Steele Pty Ltd v Banovic*, (1989) 168 CLR 165 at 176. per Deane and Gaudron JJ; cited with authority in *Purvis v New South Wales* (2003) 217 CLR 92, 141.
[2] *Australian Iron & Steele Pty Ltd v Banovic* (1989) 168 CLR 165, 176 per Deane and Gaudron JJ.
[3] Ibid, 184 cited with authority in *Purvis v New South Wales* (2003) 217 CLR 92, 142.
[4] *Purvis v New South Wales* (2003) 217 CLR 92, 143.
[5] Ibid, 142-3.
[6] *Packer v Neal* [1997] VADT 52; citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.
[7] See for example *Poniatowska v Hickinbotham* [2009] FCA 680; *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.
[8] *State of Victoria & Ors v McKenna* [1999] VSC 310, [40] citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

10. In *Department of Health v Arumugam*[9] (**Arumugam**), which was later discussed in *Kapoor v Monash University and Or* (**Kapoor**),[10] Fullagar J said it was not open to a Tribunal to draw the inference that the applicant, Dr Arumugam, was not selected for the position of Psychiatrist Superintendent because of his race simply because another less qualified candidate was ultimately selected. Fullagar J said:

> The mere fact that the appointment did not go to the man whom the Board considered to be clearly the better qualified candidate, did not of itself indicate discrimination of some kind. [11]

11. His Honour went on to say:

> If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inference to be drawn against dishonest explainers with greater certainty, but that is all. In the present case 'the ground of race' was, in the absence of explanation clearly lacking, and the non acceptance of this proffered explanation could not provide the missing elements. [12]

12. Importantly however, in *Arumugam*, Fullagar J held that it was necessary to show intention to make out a case of direct discrimination.[13] This approach was later rejected by the High Court in *Waters v Public Transport Corporation*.[14] By then by s 10 of the 1995 Act expressly provided that motive is irrelevant.

13. A different conclusion to *Arumugam* was reached in *Oyekanmi v National Forge Operations Pty Ltd*.[15] The Tribunal considered a complaint by Mr Oyekanmi, an engineer originally from Nigeria, who claimed that he was dismissed from employment because of his race. The Tribunal inferred that the reason for Mr Oyekanmi's dismissal was based on race. Relevantly, Mr Oyekanmi was asked during an employment interview whether he anticipated that he would have any problems working in an organisation that was 'all white'. The chairman of the company also gave evidence that it was crucial for Mr Oyekanmi to have 'credibility' with his colleagues, including being able to strike up working relationships and be accepted by his workmates.[16] The Tribunal rejected the argument that the credibility requirement was racially neutral. Instead, it held that the credibility requirement was applied to Mr Oyekanmi because of a perception that others in the workforce might not accept him due to his race. The Tribunal found that the reason for the dismissal – the failure to satisfy the credibility requirement – was because of Mr Oyekanmi's race.

14. Smith J considered these decisions, especially the findings in *Arumugam*, in *State of Victoria & Ors v McKenna*[17] (**McKenna**). In his reasons, Smith J cautioned that Fullagar J's comments in *Arumugam* ought to be understood in the context of the facts of that particular case. He pointed out that, in

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[9] *Department of Health v Arumugam* [1988] VR 319.
[10] *Kapoor v Monash University and Or* [2001] 4 VR 483, 495
[11] *Department of Health v Arumugam* [1988] VR 319, 325.
[12] Ibid, 330.
[13] *Department of Health v Arumugam* [1988] VR 319, 327.
[14] *Waters v Public Transport Corporation* (1992) 103 ALR 513 at 520.
[15] *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.
[16] Ibid [78].
[17] *State of Victoria & Ors v McKenna* [1999] VSC 310.

Arumugam, the selection panel had proffered an alternative, innocent explanation. Namely, that the candidate appointed to the position was better suited to the role because he was more dynamic and articulate, albeit lesser qualified than Dr Arumugam.

15. Smith J went on to say that, in discrimination complaints, the person's attribute, as well as societal prejudices and attitudes towards persons with that attribute, are relevant to drawing inferences. For example, the existence of racist attitudes and stereotypes within a community or organisation may leave open an inference of racial discrimination. It is then a matter for the court or tribunal to decide whether an innocent reason is equally or more probable than the proscribed reason. According to Smith J, a finding of discrimination would have been open in Arumugam 'if, on the evidence, it was open to the Board to find that no selection Board acting reasonably could have preferred [the other applicant] to Dr Arumugam'.[18]

16. Smith J applied these principles in *McKenna*, holding that it was appropriate for the Tribunal to infer that a police officer, Crossley, had disclosed the personal address of one of his colleagues, the complainant, to her ex-partner because of the complainant's sex. Crossley had told the Tribunal that he would have disclosed the personal address of any colleague in similar circumstances, regardless of whether the colleague was a man or woman. However, Smith J agreed that it was open to the Tribunal to reject that evidence and, instead, infer that the reason for the conduct was a discriminatory one, particularly given the surrounding evidence about a sexist culture within the workplace and particularly the sexist attitude of Crossley. In those circumstances, 'it was open to the tribunal to conclude that Crossley was reacting again in a sexist manner to aggression on the part of a woman'.[19]

17. The Commission respectfully submits that *Kapoor*[20] does not stand as authority for the proposition that the reason for treatment is determined entirely by the reasoning process of the alleged discriminator. In *Kapoor*, the Court of Appeal was concerned with s17(4)(a) of the *Equal Opportunity Act 1984* (Vic) and the reason/s why the alleged discriminator treated the other person less favourably . When read in context, the "reason" can only be that of the alleged discriminator. The Commission submits that it cannot sensibly apply in respect of any other relevant party contemplated by the provision, namely to confer an attribute which the person does not have or to ignore an attribute that the person does in fact have. In context, the conduct with which the sub-section is concerned is that of the alleged discriminator and the relevant question becomes whether it was undertaken because it was the discriminator's perception (or that person's reason) that the characteristic in question is attribute related in the way set out in the sub-section. Thus, on a plain reading of s.17(4)(a), its operation is confined to the situation where the subject was treated less fairly because the alleged offender perceives that (a) the subject

[18] Ibid, [43].
[19] Ibid, [97].
[20] *Kapoor v Monash University and Or* [2001] 4 VR 483, 496-497.

has a particular characteristic and (b) the characteristic is relevantly attribute based.

D. Evidence of a person's reasons

18. Evidence of a person's reasons for discrimination may be relevant to whether the attribute is the substantial reason for the treatment, but not determinative. The mere assertion of a ground that is not prohibited will not prevent the act from being discriminatory if the true basis for the act in question is a protected attribute.[21] In *Australian Iron & Steele Pty Ltd v Banovic* (**Banovic**),[22] Deane and Gaudron JJ accepted that genuinely assigned reasons may in fact mask the true basis for the act or decision.

19. The relevance of a person's state of mind to the question of why action was taken was discussed in a similar context by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay.*[23] In that case, French CJ and Crennan J held that:

> The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"

20. Considering the weight to be attached to the reasons asserted by a person for the treatment, French CJ and Crennan J noted:

> Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity. [24]

21. The Commission submits that while the Applicants can assert different motives for the treatment, it was open to the Tribunal to find on the facts that a substantial reason for the conduct was a discriminatory one.

E. Multiple reasons for conduct

22. In order to establish direct discrimination, it is necessary to establish a causal connection between the treatment complained of and the protected attribute. Direct discrimination only occurs where the unfavourable treatment occurred 'on the basis of' a person's protected attribute.

23. There may be multiple reasons for the discriminatory conduct, however in order to establish direct discrimination under the 1995 Act, the protected attribute must be a 'substantial' reason for the treatment, but it does not have to be the 'only' or 'dominant' reason.

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[21] *Australian Iron & Steele Pty Ltd v Banovic* (1989) 168 CLR 165 at 184, cited in *Purvis v New South Wales* (2003) 217 CLR 92, 142.
[22] *Australian Iron & Steele Pty Ltd v Banovic* (1989) 168 CLR 165, 176, per Deane and Gaudron JJ.
[23] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 657-8
[24] Ibid.

24. This was discussed in *Stern v Depilation & Skincare Pty Ltd*,[25] where Deputy President McKenzie said:

> The attribute need not be the only or dominant reason for the treatment, but must be a substantial reason for it. This means that the attribute must be a reason of substance for that conduct. *The motive of the discriminator is irrelevant, and it is also irrelevant whether the discriminator was aware of the discrimination or considered the treatment less favourable*.[26] (emphasis added)

25. In that case, the Tribunal held that Ms Stern's pregnancy was a 'substantial reason' for her redundancy. The Tribunal found that, although the 'dominant reason' for the redundancy was a downturn in business, the factor which 'actuated the minds' of the decision-makers who selected Ms Stern for redundancy was the fact that she was a part-time employee working reduced hours. The only reason Ms Stern was working those hours was because she was pregnant. Pregnancy was, therefore, a substantial reason for the conduct.

26. The Commission submits that it was open to the Tribunal to find that the basis of the refusal of the booking by the Second Applicant was the (same sex) sexual orientation of the proposed attendees, or the personal association of the proposed attendees with persons identified by their same sex orientation.[27]

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25 March 2013

[25] *Stern v Depilation & Skincare Pty Ltd* [2009] VCAT 2725.
[26] Ibid, [8].
[27] *Cobaw Community Health Service v Christian Youth Camps Ltd* [2010] VCAT 1613, [202]-[203].