FEDERAL MAGISTRATES COURT OF AUSTRALIA

GARDNER v AANA LTD *[2003] FMCA 81*

HUMAN RIGHTS – Discrimination on the grounds of pregnancy – interim ban imposed to prevent pregnant women from playing in a Netball trophy competition – whether the interim ban discriminates against the applicant on the grounds of her pregnancy within the meaning of the Sex Discrimination Act – whether by reasons of s.39 of the Act such conduct is unlawful – statutory intention and construction of s.39 – whether a narrow or broad approach should be taken – whether there has been an extension of the exemption to include a class of "de facto" members – whether those who are interpreting statutes should lean towards a construction consistent with international conventions and obligations – damages sought for personal and financial loss – leave granted to the Sex Discrimination Commissioner pursuant to s.46PV of the HREOC Act for intervention in the proceedings as *amicus curiae*.

Sex Discrimination Act 1984 (Cth), ss.3, 7, 22, 39
Human Rights & Equal Opportunity Act 1986 (Cth), ss.46PP, 46PH(2), 46PV
Acts Interpretation Act 1901 (Cth), s.15AA
Disability Discrimination Act 1992 (Cth)

Waters v Public Transport Corporation (1991) 173 CLR
IW v City of Perth (1997) 191 CLR 1
X v Commonwealth (1999) 200 CLR 177
Qantas Airways Limited v Christie [1998] 193 CLR 280
Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165
Australian Medical Council v Wilson (1996) 68 FCR 46
Commonwealth Bank of Australia v HR & EO Commission (1998) 150 ALR 1
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 *Plaintiff S157 v Commonwealth of Australia* (2003) 195 ALR 24
Commonwealth of Australia v Williams [2002] FCAFC 435

Applicant:	TRUDY ANN GARDNER
Respondent:	ALL AUSTRALIA NETBALL ASSOCIATION LIMITED
File No:	AZ 154 of 2002
Delivered on:	13 March 2003
Delivered at:	Sydney
Hearing date:	26 February 2003
Judgment of:	Raphael FM

REPRESENTATION

Counsel for the Applicant:	Mr Peter Day
Solicitors for the Applicant:	Finlaysons Solicitors
Counsel for the Respondent:	Mr R Dubler
Solicitors for the Respondent:	Corrs Chambers Westgarth Lawyers
Counsel for the Commission:	Mr J Hunyor
Solicitors for the Commission:	Legal Department HREOC

ORDERS

(1) The Court Declares:

(a) The Respondent discriminated against the applicant pursuant to ss.7 and 22 of the Sex Discrimination Act by preventing her from playing netball matches in the trophy on 29 June, 7 July and 13 July 2001.

(b) The conduct of the Respondent was not exempted by virtue of s.39 of the Sex Discrimination Act.

(2) The Court Orders:

(a) Respondent to pay the applicant the sum of $6,750.00 by way of agreed damages.

(b) Respondent to pay the applicant's costs pursuant to Part 21, Rule 21.10 of the Federal Magistrates Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT ADELAIDE

AZ 154 of 2002

TRUDY ANN GARDNER
Applicant

And

ALL AUSTRALIA NETBALL ASSOCIATION LIMITED
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant in this matter is an elite netball player who, during the 2001 netball season, was the captain of the South Australian club known as the Adelaide Ravens (the "Ravens"). Between the period 20 April 2001 to 11 August 2001 the Ravens competed in the 2001 series of a competition organised by the respondent and known as "The Commonwealth Bank Trophy" (the "Trophy").

2. The respondent is the federal body organising the of sport netball in Australia. Its member organisations are properly constituted organisations controlling netball in a state or territory of Australia. For the purposes of these proceedings the relevant member was the South Australian Netball Association Incorporated ("SANA").

3. SANA formed two teams in South Australia to play in the Trophy. One of them was the Ravens. The players who participated in the trophy for South Australia were all associated with netball teams in South Australia. These were called feeder teams. The applicant played for a feeder team known as the Cougars. The applicant is not a member of the respondent nor is she a member of SANA. Both of those organisations are incorporated organisations.

4. On 18 June 2001 the respondent imposed an interim ban so as to prevent pregnant women from playing in the trophy. The applicant was pregnant when the interim ban was imposed. As a result of the interim ban the applicant was prevented from playing netball matches in the trophy on 29 June, 7 July and 13 July 2001. As a result she lost match payments, sponsorship and suffered hurt and humiliation. The quantum of her loss has been agreed in the sum of $6,750.00.

5. On 2 July 2001 the applicant made a complaint to the Human Rights & Equal Opportunity Commission ("HREOC") in which she claimed that she had been discriminated against on the basis of her pregnancy in breach of the *Sex Discrimination Act 1984* (Cth) (the "SDA").

6. On 17 July 2001 the applicant commenced proceedings in the Federal Magistrates Court seeking an interim injunction pursuant to s.46PP of the *Human Rights & Equal Opportunity Act 1986* (Cth) ("HREOC Act"). These proceedings were brought against the National Netball League Pty Limited (ACN 075 691 86). This company was formed by the respondent to undertake the running of the trophy. In the facts that have now come to light (that in 2000 the respondent took over the responsibilities of the League) the complaint to HREOC and the proceedings for the injunction may have been wrongly titled but no point has been made upon this by either party and the matter proceeded before me on the basis that the correct respondent had been named and would accept responsibility for any findings.

7. On 18 July 2001 Federal Magistrate McInnis granted interim injunctions which had the effect of permitting the applicant to continue playing netball in the trophy until the end of the season. This she did.

8. On 30 May 2002 HREOC issued a notice of termination pursuant to s.46PH(2) of the HREOC Act. On 27 June 2002 the applicant commenced these proceedings.

9. The respondent accepts for the purposes of these proceedings only that the interim ban discriminates against the applicant on the grounds of her pregnancy within the meaning of the Sex Discrimination Act but claims that by reasons of s.39 of the Act such conduct is not rendered unlawful.

The intervention of the Sex Discrimination Commissioner

10. Prior to the hearing the Sex Discrimination Commissioner made an application pursuant to s.46PV of the HREOC Act for leave to assist the court as *amicus curiae* in relation to the proceedings. I was provided with an affidavit of Prudence Jane Goward, the Commissioner, and submissions were made to me by her counsel. The respondent objected to the intervention of the Commissioner on the grounds that it might lengthen the case and did not appear to provide assistance to the court which could not have been dealt with by the advocate for the applicant. I permitted the Commissioner to appear because I took the view that as the case involved a statutory interpretation of s.39 I would be assisted by the views of the Commissioner and the representations which her counsel had reduced to writing. I informed Mr Dubler on behalf of the respondent that he would not be prejudiced by this ruling and that he would be given an opportunity to respond in writing himself if he felt that was needed. In the event written submissions were provided by all parties at the conclusion

of the hearing. I was much assisted by the Commissioner's counsel as I was by Mr Dubler and the advocate for the applicant.

The submissions of the parties in relation to s.39

11. Section 39 of the SDA is in the following form:

> ***39*** *Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person's sex, marital status or pregnancy, in connection with:*
>
> *(a) The admission of persons as members of the body; or*
>
> *(b) The provision of benefits, facilities or services to members of the body.*

12. It is accepted by all parties that the respondent is a voluntary organisation. It is accepted that its member SANA is also a voluntary organisation. All parties agree that the purpose of the inclusion into the Act of s.39 was to protect the right of freedom of assembly so that a voluntary organisation could choose those persons it wished to be members and deal with those members in any manner that the members agreed, whether or not those activities might appear to persons who are not members of the association to be discriminatory.

13. The applicant's submission is simple. She says that the Act should be construed on the basis of its terms. These provide an exemption to voluntary organisations in the manner in which they treat their members. This treatment can occur either at the stage when the member is selected or whilst the member remains in the membership of the association. The applicant is not a member of the respondent and cannot be. The applicant is not a member of SANA and cannot be. She is simply not covered by the exemption. She is entitled to the protection otherwise given by ss.7 and 22 of the SDA. The respondent has for the purposes of these proceedings admitted that it discriminated against her contrary to the Act and I should make such a declaration and give a finding in damages of the agreed amount.

14. The Sex Discrimination Commissioner submits that I should take an approach to the construction of s.39 which ensures that, consistent with authority, I take account of and give effect to the purposes and objects of the legislation: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gauldron J; *IW v City of Perth* (1997) 191 CLR 1 at 14 per Brennan CJ and McHugh J, at 22-23 per Gauldron J, at 27 per Toohey J, at 39 and 41-42 per Gummow J and 58 per Kirby J. The Commissioner also reminds me that in accordance with the principle just adumbrated exemptions and other provisions which restrict rights should be viewed narrowly: *X v Commonwealth* (1999) 200 CLR 177 at 223 and *Qantas Airways Limited v Christie* [1998] 193 CLR 280 at 332. The Commissioner also

refers me to s.15AA of the *Acts Interpretation Act 1901* (Cth) which is in the following form:

> *"15AA Regard to be had to purpose or object of Act*
>
> *(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."*

15. The objects of the SDA are set out in s.3 and include, relevant to the present matter:

> *"a) To give effect to certain provisions of the Convention on the Elimination of all Forms of Discrimination against Women;*
>
> *b) To eliminate, so far as is possible, discrimination against persons on the grounds of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs…"*

The Commissioner argues that the use of the words "so far as is possible" emphasises the need to give a narrow construction to any exemption from the Act such as that contained in s.39. The exemptions which are found in Part 2 Division 4 of the SDA are designed to cover only particular fields whilst maintaining the unlawfulness of acts of discrimination falling between exemptions. If too broad a construction of an exemption was given it would overlap with or completely subsume other exemptions and thus defeat the purpose behind the manner in which the division is constructed as well as being contrary to the objects of the SDA as a whole.

16. When she comes to consider the construction of s.39 the Commissioner notes that it is not a general exemption but is restricted to the two circumstances set out in the sub-paragraphs. These are the admission of members and the provision of benefits, facilities or services to them. The Commissioner argues that the words "in connection with" are placed in the section to give it sufficient flexibility to provide for two possibilities. The first is to prevent so narrow a reading of the Act that it would not apply to the refusal of admission or the denial of benefits. The words are used in order to extend the exemption to the gamut of those areas in respect of which exemption is to be granted.

17. The second area to which the Commissioner argues the exemption applies by extension on the basis of the use of the words "in connection with" is in the provision of benefits facilities or services to a class of persons she describes as "de facto" members. In order to explain her points she uses the example of a men only organisation which invites members to bring along to a meeting of the association other males. She argues that because of the connection

between the makeup of the membership (all males) which is exempted, and the proposed guests (all males), the conduct of the association in inviting these people would also be protected. On the other hand if the association informed its members that they could invite any person other than a pregnant woman to the meeting this would not be covered, because pregnancy has no connection with the exempted discriminatory conduct in granting membership.

18. The Commissioner submits that s.39 cannot apply to the conduct of the respondent because it was directed at the applicant who was not a member and could not be a de facto member because the limitation on membership to state or federal organising bodies does not conceivably include a human female netball player. Likewise the Commissioner argues that the other use of the words "in connection with" does not extend the exemption to the activities of the respondent towards this particular applicant.

19. The respondent's case is that s.39 should be constructed so as to give a liberal and beneficial construction to the words used. (see *IW* supra at 12 per Brennan CJ and McHugh J). He goes on to provide three quotations which I accept are important in consideration of the provisions of this section:

> *"...given the artificial definitions of discrimination in the Act and the restricted scope of their applications, the court or tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discriminatory or equal opportunity statute... Those legislatures have also deliberately confined the application of anti-discrimination legislation to particular fields and particular activities within those fields... Many persons argue that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope ... Because of the restricted terms of the particular statue, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people regard as discriminatory."*

IW v City of Perth at 14-15 per Brennan CJ and McHugh J

> *"Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.*

(1993) 46 FCR 302 *HREOC v Mt Isa Mines Limited* at 326 per Lockhart J."

> *"The courts should avoid "narrow or pernickety approaches".*

IW v City of Perth at 58 per Kirby J.*"*

20. The respondent points to the chain under which the trophy is administered. The competition is not open to the public. The right to field one or more teams in the trophy is exclusively offered to the respondent's members. They in turn field teams from their own members either directly or indirectly through a member club/division (in the case of SANA) so it could be that a player is member of a club which club is a member of SANA which is itself a member of AANA the respondent.

21. The respondent argues that if SANA was an unincorporated institution and if the clubs which belonged to SANA were unincorporated the effect would be that the members of the clubs would be members of the respondent. The respondent argues that it would be simple for organisations such as the respondent to get around the problems caused by incorporation in barring access to the exemption contained in s.39 by making themselves unincorporated institutions. It argues that there really is just a netball family and it is the whole family being federal body/state body/clubs/players who should fall under the umbrella of protection. The respondent argues that the submissions of the applicant and the Commission appear to come down to taking objection to the mere fact that AANA members are state bodies who, being non-natural persons, will not physically be the persons fielding the relevant teams. This submission by the applicant and Commission has no logic or common sense to it.

Decision

22. I accept, as all the parties did, that the words "in connection with" extends the scope of s.39 so that the meaning of "admission" will include non-admission or the terms conditions or manner of admission and the term "the provision of benefits, facilities or services" will include the refusal to provide, or the terms, conditions or manner of provision of benefits, facilities or services to members. But I do not accept that the words can be used to expand the definition of "members". However sensible the Commission's submissions in this regard may appear from the example given, I believe the expansion of the exemption to include a class of "de facto" members would be a very dangerous precedent and would seem to fly in the face of the strictures of the courts to interpret exemptions narrowly and give the words of statutes their natural and proper meaning. The difficulties that exist in the various discrimination acts with which the courts deal both at state and federal level is exemplified in the first quotation found in [19] above. Because of the awkward wording of the definition of "discrimination" and "indirect discrimination" there is already authority which has the effect of requiring complainants to carry out complex exercises in statistics in order to ascertain whether or not they have been treated less favourably than other persons (See *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Australian Medical Council*

v Wilson (1996) 68 FCR 46; *Commonwealth Bank of Australia v HR & EO Commission* (1998) 150 ALR 1). We do not need to voluntarily raise further hurdles.

23. I am of the view that if there is to be any extension of this exemption it is a matter for Parliament not the courts.

24. The High Court has also made clear how important it is that those who are interpreting statutes should lean towards a construction which is consistent with the terms of the overseas conventions and obligations into which this country has entered (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Plaintiff S157 v Commonwealth of Australia* (2003) 195 ALR 24 at [29])

25. I accept what Mr Dubler says, that it would not be difficult for voluntary organisations who find themselves in the position of this respondent to change their constitution so that any person who might be affected by their decisions in relation to their principal objects could be classed as a member. But equally, had the Parliament intended that such persons should be included within the exemption granted by s.39 it could have written the legislation in a different way. It could have simply provided that *"nothing renders it unlawful for a voluntary body to discriminate against a person on the grounds of the person's sex, marital status or pregnancy";* it could have included the words *"or non-members"* after the word *"members"* in s.39(b) of the SDA; or it could simply have omitted the words *"to members of the body"* altogether.

26. I think that I am entitled to assume, consistent with the authorities, that Parliament only intended the most narrow construction of this clause. I note that the Full Bench of the Federal Court did not accept a wide interpretation of s.53 of the *Disability Discrimination Act 1992 (Cth)* in *Commonwealth of Australia v Williams* [2002] FCAFC 435 at [34]. The clause offends against the now generally accepted proposition that discrimination in any shape or form is wrong. It does so in order to promote what has obviously been considered a higher purpose, namely the freedom of association. If a voluntary organisation wishes to take advantage of this section then it is entitled to do so. But if it constitutes itself in a way which puts up a barrier towards it taking that advantage the courts should not come to its aid. The exemption is limited to the organisation's relationship with its members. Given the constitutions of the respondent and SANA (produced in evidence in these proceedings) the applicant was not and could never have been a member of the respondent. The applicant was not and could never have been a member of SANA. I do not accept that the provision of the service by the respondent to SANA and the provision by SANA to the applicant of the opportunity to play in the trophy constituted a provision of the service to a member within s.39(b). It strains the construction of the sub-section where clear words are used and it widens the scope of an exemption that is clearly

contrary to the purposes of the Act and the convention obligations of the Federal Government which passed it.

27. I declare that the respondent discriminated against the applicant pursuant to ss.7 and 22 of the Sex Discrimination Act by preventing her from playing netball matches in the trophy on 29 June, 7 July and 13 July 2001. I declare that the conduct of the respondent was not exempted by virtue of s.39 of the SDA. I order the respondent to pay the applicant the sum of $6,750.00 by way of agreed damages. I order that the respondent pay the applicant's costs pursuant to Part 21, Rule 21.10 of the Federal Magistrates Court Rules.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: