ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

BAIRD V STATE OF QUEENSLAND [2005] FCA 495

Federal Court of Australia, Dowsett J, 19 August 2005

Whether Government as funder of indigenous employment was also an employer and obliged to pay award rates.

Key words: Employment, Australia, Racial Discrimination, Church Mission, Indigenous, Wages, Employer/Employee Relationship

1. Between 1975 and 1986, the eight indigenous applicants involved lived on one of two North Queensland missions run by the Lutheran Church of Australia Inc. The mission near the Bloomfield River was known as "Wujal Wujal", while the one at CapeBedford was named "Hope Vale". These missions were conducted on lands reserved for the purposes laid out initially in the *Aborigines Act 1971* (Qld) and later its replacement, the Community Services *(Aborigines) Act 1984* (Qld). The applicants claimed to have been employed there by the Lutheran Church in its role as agent for the relevant Queensland Government departments and officers, on rates of pay significantly lower than those paid to other Government employees carrying out similar work and/or on remuneration below the levels set out in the appropriate industrial awards.

2. Because of such wage differentiation, they argued that they had experienced discrimination based on race as outlined in the *Racial Discrimination Act 1975* (Cth). As this Act commenced operation on the 31st October, 1975, they sought declaratory relief, an apology and damages from that time as permitted by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

3. With respect to their wages, the period of the claim extended to 30th November, 1986. Section 15 of the *Aborigines Act 1971* (Qld) outlined two categories of reserve - those run by Government-appointed managers; and those whose management was delegated to religious organisations. Upon the reserves themselves, existing Aboriginal councils were continued and the creation of new councils was encouraged.

4. Under this Act, the allocation of managerial responsibility between such Aboriginal councils and their church administrators was ill-defined. With the introduction of the *Community Services (Aborigines) Act 1984* (Qld), the councils assumed primary responsibility for the reserves' administration. Financial support was provided to both the Lutheran missions by the Queensland Government. The Lutheran Church operated the missions on a non-profit basis and paid wages on the basis of the funds allocated to them for that purpose by the Government. Although the Government apportioned the grants, the Church, the council or a collaboration of both were responsible for the actual payment of the indigenous workers as well as determining the overall level of indigenous employment.

According to the then Queensland Treasurer, Sir Llew Edwards, the missions functioned independently of the Government, despite their reliance on it for funding.

5. Regulation 68 of the Aborigines Regulations 1972 (Qld) referred to, "An Aborigine who is employed, other than on a Reserve". Until 1979, this comment was interpreted by the Government as authorisation for the payment of indigenous employees on reserves at less than award rates. This notion was dispelled by Justice Matthews in the Murgha case in May, 1979, when he stated that these words were not strong enough to displace the statutory rights of indigenous workers on reserves to receive the wages they were entitled to under the relevant industrial awards. After reviewing the period in contention, Justice Dowsett in the Federal Court focused on whether the indigenous applicants were "employed" by the Government as required to satisfy section 15 of the *Racial Discrimination Act 1975* (Cth).

6. Since the claims were brought against the Queensland Government and not the Lutheran Church of Australia, it was crucial that the applicants establish an employer/employee relationship with the Government. Justice Dowsett concluded that, although wages were related to Government funding, it seemed clear that the indigenous workers were in fact employed by either the Church or an Aboriginal council since these bodies ultimately had the discretion to set wages and employment levels. The workers were not employed by the Government.

7. On the alternative claim under section 9 of the *Racial Discrimination Act 1975* (Cth), that discrimination arose because of the lower wages paid, his Honour agreed that indigenous inhabitants on reserves suffered considerable disadvantage compared with the general population. However, the payment of a grant designed to benefit Aboriginal people was a neutral act devoid of discriminatory undertones based on race. Any discrimination arose from the lack of equality between the amounts paid to indigenous workers from the grants and to other workers from other sources. Numerous factors were responsible for this, none of which were related to the grants. In the judge's view, the grants were not connected to the denial of proper pay rates to indigenous workers. Rather, they allowed the Church to pay the indigenous applicants a wage.

8. Despite the fact the applicants failed to make out their case, Justice Dowsett castigated the Government for its failure to deal with breaches of both Queensland and Commonwealth legislation in continuing to allow non-award wages to be paid to indigenous workers after the decision was handed down in the Murgha case in 1979. He also assessed damages for lost wages to simplify matters if the case was appealed.

IMPLICATIONS

What would have been the situation if the Council or the Church had been made a party to the action? It serves as a warning to recipients of government funding to ensure that they can cover their financial responsibilities and not merely rely on the grant terms to be in accordance with the law.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/495.html

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