ACPNS LEGAL CASE REPORTS SERIES

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Australian Christian College Moreton Ltd & Anor v Taniela [2022] QCATA 118

Queensland Civil and Administrative Tribunal, Appeal, Senior Member Howard, Presiding Member, Member Fitzpatrick, 9 August 2022

An appeal from a finding of direct and indirect discrimination by a school.

Key words: Human Rights, Queensland, Anti-discrimination Act 1991 (Qld), School, Uniform Policy, Direct Discrimination, Indirect Discrimination

1. Cyrus Taniela is of Cook Islander and Niuean descent. It is a tradition or cultural practice associated with Cook Island/Niuean culture for the eldest son to undergo a hair-cutting ceremony at a time of choosing of the parents. This is usually between 5 and 10 years of age. In accordance with tradition, Cyrus' hair had not been cut since birth.

2. In 2020, Cyrus, aged 5, commenced school at the Australian Christian College – Moreton Ltd (the school). Shortly afterwards, Cyrus' mother was informed that his long hair (usually worn in a bun) was in breach of the school uniform policy, and subsequently that he must cut his hair by second semester 2020 or be 'unenrolled' from the school.

3. The school's uniform policy relevantly provided that 'Boys' hair is to be neat, tidy, above the collar and must not hang over the face. Extreme styles, ponytails and buns are not permitted.'

4. A complaint of discrimination against the school and its principal was successful in 2020: see Taniela v Australian Christian College Moreton Ltd [2020] QCAT 249. The Tribunal found that the school and its principal had directly and indirectly discriminated against Cyrus on the basis of race in breach of s 39 of the Anti-Discrimination Act 1991 (Qld) (the AD Act). Section 39 provides that an educational authority must not discriminate by excluding a student or by treating a student unfavourably in any way in connection with their training or instruction.

5. On appeal by the school, six grounds of appeal were advanced. Ground 1 was abandoned at the oral hearing. Grounds 2, 3, and 4 alleged errors of law and errors of fact by the Tribunal in deciding the direct discrimination claim. Grounds 4 and 5 alleged errors of law and/or fact by the Tribunal in deciding the claim of indirect discrimination.

6. The Tribunal considered grounds 2, 3 and 4 together as they dealt with similar matters. These were:

    - Ground of appeal 2: did the tribunal err in law in finding that because the attribute for the purposes of s 10 of the AD Act included the characteristic of having long hair until the hair-cutting ceremony, the relevant circumstances could not include non-compliance with the uniform policy, where noncompliance with the uniform policy was not a characteristic of Cyrus' race (but only a consequence of the characteristic)?
    - Ground of appeal 3: did the Tribunal err in law in failing to consider, in applying the test for direct discrimination under s 10 of the AD Act, whether race was the basis for any less favourable treatment?
    - Ground of appeal 4: did the Tribunal err in fact by failing to find, in applying the test for direct discrimination under s 10 of the AD Act, that non-compliance with the school uniform policy was the basis for any less favourable treatment, as opposed to race?

7. Ground 2 was allowed. The Tribunal accepted the submissions of the school that non-compliance with the uniform policy was not a characteristic of Cyrus' race, and that it might be contravened without any connection to Cyrus' cultural practices (at [56]). The Tribunal also accepted that the school correctly identified the comparator as a boy who had his hair in a bun/or otherwise did not comply with the uniform policy, so that the relevant circumstances were non-compliance with the uniform policy (at [57]).

8. As to grounds 3 and 4, these were also allowed. These grounds related to whether discrimination was "on the basis of an attribute". Again, the Tribunal on appeal accepted the school's submissions as to an error of law below (at [64]). The Tribunal said (at [65]-[68]):

    > We find that an error of law occurred in the Tribunal below in its formulation of the comparator whereby the Tribunal excluded non-compliance with the uniform policy from the circumstances said to be the same or not materially different from those in which Cyrus found himself.
    >
    > We find that there has been an error of law in applying the test for direct discrimination under s10 of the AD Act, by the Tribunal failing to consider whether race was the basis for any less favourable treatment.
    >
    > We find that there has been an error of fact by the Tribunal failing to find, in applying the test for direct discrimination under s 10 of the AD Act, that non-compliance with the school uniform policy was the basis for any less favourable treatment, as opposed to race. Insofar as leave to appeal is required, leave is granted in order to correct an error in the Tribunal below.
    >
    > We conclude that once the comparator is correctly formulated, there can be no finding of direct discrimination on the basis of the evidence, which is accepted, that the comparator would have been treated in the same way as Cyrus and that there has been no directly discriminatory treatment.

9. The outcome of these findings on appeal was that there had been no direct discrimination by the school.

10. Ground of appeal 5 was: did the Tribunal err in law, or in the alternative in fact, in finding that Cyrus could not comply with the requirement to have his hair cut before his 7th birthday in circumstances that the hair-cutting

ceremony was a matter of choice for the parents, and could have occurred consistent with cultural practice, prior to Cyrus attending school or the time of lodgement of the complaint?

11. This ground of appeal failed. The Tribunal on appeal agreed with the Tribunal below that the timing of the hair cutting ceremony was a matter for Cyrus' parents and was integral to the ceremony. Because it was to be held around his 7th birthday, he could not comply with the requirement to have his hair cut earlier and therefore, could not, consistently with the cultural practices of his racial group, comply with the requirement imposed to cut his hair before semester 2, 2020.

12. The Tribunal on appeal did not consider an error of law or an error of fact was demonstrated by the Tribunal below on that matter. There was sufficient evidence on which to base a reasonable conclusion that having his hair cut at a time his parents thought appropriate was part of Cyrus' cultural practice (at [83]). Leave to appeal was refused on that ground.

13. On ground 6, which was: did the Tribunal err in fact in finding that the term imposed under the uniform policy was not reasonable in circumstances where: (i) The appellants presented unchallenged evidence of the deleterious effect on the school of not enforcing its uniform policy; (ii) The uniform policy was knowable to Ms Taniela prior to enrolling Cyrus; and (iii) Any non-compliance was able to be remedied by holding a haircutting ceremony at an earlier time, the Tribunal on appeal again refused leave to appeal. The Tribunal below had weighed all the relevant considerations in reaching its decision on indirect discrimination.

14. Thus, the appeal was allowed with respect to appeal grounds 2, 3 and 4. However, the appeal was refused with respect to appeal grounds 5 and 6. There was no direct discrimination, but indirect discrimination was confirmed. The finding of discrimination by the Tribunal below was upheld.

IMPLICATIONS

In May 2021, Queensland's Attorney-General requested the Queensland Human Rights Commission (QHRC) conduct a review of the Anti-Discrimination Act 1991 (Qld) (AD Act) to ensure it continues to provide suitable protection against discrimination and sexual harassment.

After a review process which attracted over 125 written submissions from various stakeholders, the QHRC presented its final report with recommendations for legislative reform to the Attorney-General on 30 July 2022.
The report is expected to be published after it is tabled in state parliament.

The Queensland Government may seek to redefine direct and indirect discrimination in the AD Act and clarify that they are not mutually exclusive and that a person may experience conduct amounting to both.

VIEW THE CASE

This case may be viewed at https://www.sclqld.org.au/caselaw/QCATA/2022/118

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