

Civil and Administrative Tribunal
New South Wales

Case Name: Wade v Lord Howe Island Board Administration Office

Medium Neutral Citation: [2020] NSWCATAD 190

Hearing Date(s): 12 February 2020

Date of Orders: 24 July 2010

Decision Date: 24 July 2020

Jurisdiction: Administrative and Equal Opportunity Division

Before: R J Perrignon, Senior Member
M Murray, General Member

Decision: Pursuant to section 55(1)(b) of the Civil and Administrative Tribunal Act 2013 and section 102 of the Anti-Discrimination Act 1977, the proceedings are dismissed

Catchwords: HUMAN RIGHTS - discrimination – grounds – age and disability
CIVIL PROCEDURE — Summary disposal — Dismissal of proceedings

Cases Cited: *W v City of Perth* [1997-97] 191 CLR 1
Rainsford v Victoria (2007) 167 FCR 1

Texts Cited: None cited

Category: Principal judgment

Parties: Chris Wade (Applicant)
Lord Howe Island Board Administration Office (Respondent)

Representation: Counsel:
N Gaven (Respondent)

Solicitors:

Applicant (Self Represented)

File Number(s): 2019/00376890

Publication Restriction: None

JUDGMENT

1 The applicant, Mr Wade, complains that the Lord Howe Island Board discriminated against him and members of his family on the grounds of disability and age in 2019, when it declined his application to bring a vehicle onto the island. The Board seeks summary dismissal of the proceedings, on the basis among others that the complaint is not justiciable by the Tribunal because, in making its decision, the Board was not providing a 'service' as defined in the *Anti-Discrimination Act 1977*.

Background

- 2 Mr Wade and his wife have owned a property on Lord Howe Island for over twenty years, by way of perpetual lease. They do not live on the island, but they spend some months there every year with their family, which consists of three young children and three grandparents. They used to own a car on the island, but no longer do so.
- 3 On 26 January 2019, Mr Wade and his wife applied for the Board's approval to bring a small 4-cylinder car onto the island, to transport family members as necessary. He asserted that there were exceptional circumstances justifying the grant of approval. By letter dated 1 March 2019, the Board by its Chief Executive Officer, Mr Adams, declined the application, on the basis that exceptional circumstances had not been demonstrated.
- 4 Mr and Mrs Wade asked for a review of the decision. By letter dated 5 July 2019, the Board's manager of Business and Corporate Services, Mr Van Gaalen, indicated that the Board's original decision had been upheld on review.
- 5 Mr Wade complained to the Anti-Discrimination Board that, in declining his application to bring a vehicle onto the island and upholding its own decision on review, the Board discriminated against him and four of his family members, variously on the grounds of disability or age, or both.

- 6 The President of the Anti-Discrimination Board accepted Mr Wade's complaints for investigation, on the basis that he was alleging a breach of sections 49M(1) and 49ZYN of the *Anti-Discrimination Act 1977*. Section 49M(1) provides that it is unlawful for a person who provides services to discriminate against a person on the grounds of disability by refusing to provide the person with those services, or in the terms on which he or she provides the person with them. Section 49ZYN makes similar provision with respect to discrimination on the grounds of age.
- 7 The President has referred the complaint to the Tribunal for determination. In the Tribunal, the matter has progressed to a case conference and mediation.

Grounds for dismissal

- 8 As indicated, the Board applies for summary dismissal of the proceedings, on the basis that in considering and determining the application to bring a vehicle onto the island, it was not providing a 'service'. In the alternative, it argues that it did not refuse to provide any such service. In the further alternative (based in part on Mr Wade's alleged failure to provide documentary evidence in support of his application to the Board, despite request) it argues:
- (1) that the proceedings are frivolous, vexatious, misconceived and lacking in substance (section 55, *Civil and Administrative Tribunal Act 2013*; Section 102, *Anti-Discrimination Act 1977*),
 - (2) that the conduct alleged, if proven, would not disclose a breach of the Act, and
 - (3) that no further action should be taken in respect of the complaint: ss 91 and 92, *Anti-Discrimination Act 1977*.

Evidence and submissions

- 9 On the summary dismissal application, the Board tendered the President's report. Both applicant and respondent have provided written submissions, which include in the case of the Board a chronology of events. Both parties addressed the Tribunal orally.

Whether the Board provided a service

- 10 It is convenient to deal first with the preliminary issue as to whether, in considering and determining the application, the Board refused to provide a 'service', or discriminated in the terms on which it provided a 'service'.

- 11 To succeed, Mr Wade will have to demonstrate that, in considering his application and/or declining it, at first instance or on review, the Council either refused to provide him with a service, or discriminated against him and members of his family in the terms on which the service was provided.
- 12 The Council submits that he cannot do either, because the consideration and determining of applications of this kind by the Board is not a 'service'. In the alternative, it argues that the declinature of Mr Wade's application, at first instance and on review, cannot have amounted to a refusal to provide a service. For those propositions, it relies on the decisions of the High Court in *IW v City of Perth* [1997-97] 191 CLR 1 and of the Federal Court of Australia in *Rainsford v Victoria* (2007) 167 FCR 1, which are considered below.
- 13 "Service" is defined in section 4 of the Act to include 'services provided by a council or public authority'. 'Council' is defined to include a council within the meaning of the *Local Government Act 1993*, which in turn defines the term, for certain purposes at least, to include the Board.
- 14 In his written submissions [Part 4], Mr Wade argues that the definition of "service" should be read broadly, giving effect to the scope and purpose of the Act. He relies on a number of overseas authorities to support this proposition.
- 15 He also notes that the fee for lodging an application to bring a car onto the Island is described by the Board on its website as a fee for service. Much of his remaining submissions deals with his perception that the Board's decision was unfair, discriminatory, ill-adapted to protect the Island's environment, and failed to have due regard to the law against discrimination and the needs of children. He quotes from the *United Nations Convention on the Rights of Persons with Disabilities*, its *Universal Declaration on Human Rights*, its *Convention on the Rights of the Child*, and relies on numerous overseas authorities and Australian Acts of parliament, including the *Disability Discrimination Act 1992 (Cth)* and *Disability Services Act 1993* [sic, 1986] (Cth). With due deference to his researches, though the provisions of statutes and caselaw in other jurisdictions can be relevant, this Tribunal is bound to apply the laws of New South Wales, and the principles enunciated by Courts which are superior to it in the appellate hierarchy, particularly by the High Court of Australia.

The Board

- 16 The Lord Howe Island Board is a statutory corporation constituted pursuant to section 4 of the *Lord Howe Island Act 1953* (NSW). For the purposes of any Act, it is taken to be a statutory body representing the Crown: section 4(6). The Board is 'charged with the responsibility of administering the affairs of the Island' and with 'the care, control and management of the Island and of the affairs and trade of the Island': sections 4(2) and 11(1). Its extensive functions include adopting any measures and executing schemes 'for the improvement of the conditions and for the welfare of the Island and of the residents thereof'. In the exercise of its powers, authorities, duties and functions, the Board is required to pursue its charter: section 5(2), which includes the management, protection and conservation of the Island's environment.
- 17 Regulation 84 of the *Lord Howe Island Regulation 2014* prohibits a person from bringing a motor vehicle onto the Island, 'unless the Board has given its approval to the use of that vehicle on the Island'. Regulation 87 prohibits the driving or riding of a motor vehicle on the Island, 'except in accordance with the approval of the Board'.
- 18 Regulation 84 prevented Mr Wade from bringing a vehicle onto the Island without the Board's approval. As indicated, he sought that approval, and it was declined.
- 19 The Board has developed a written policy which sets out the criteria by which it determines applications for approval to bring motor vehicles onto the Island. A copy of the policy was attached to the Board's written submissions.
- 20 In oral argument, Mr Wade sought to enlarge his complaint to include the adoption of that policy by the Board. The Tribunal was not persuaded to grant that application. For the purposes of this decision, however, the Tribunal takes the complaint to include not only the declination to allow him to bring a motor vehicle onto the Island, but also the process of consideration by the Board in deciding to decline the application and in conducting its review, to the limited extent that the evidence before us discloses what that process was.

Consideration

- 21 There is no dispute that, in declining its approval and upholding its decision on review, the Board was exercising its statutory function of controlling and managing the affairs of the Island. The issue for determination is whether, in considering and determining the applications for approval and review of decision, the Board was providing a 'service', attracting the operation of sections 49M(1) and 49ZYN of the *Anti-Discrimination Act 1977*.
- 22 In *IW v City of Perth* [1997-97] 191 CLR 1, a majority of the High Court found that the Council of the City of Perth did not refuse to provide a service for the purposes of the *Equal Opportunity Act 1984* (Western Australia) when it considered and declined an application to use premises in a shopping precinct as a drop-in centre for persons infected with HIV. Brennan CJ and McHugh J found at [11] – emphasis added:

“The term "services" has a wide meaning. The Macquarie Dictionary relevantly defines it to include "an act of helpful activity"; "the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance"; "the organised system of apparatus, appliances, employees, etc, for supplying some accommodation required by the public"; "the supplying or the supplier of water, gas, or the like to the public"; and "the duty or work of public servants". **But wide as the definition is, in our opinion it is not capable of including a refusal to exercise the statutory discretion provided for by the Town Planning and Development Act 1928 WA and Clause 40 of the City of Perth City Planning Scheme to approve the use of premises for use other than as a shop.**”

- 23 They explained at [18]:

“The process by which the Council considers applications for approvals is not in our view arguably describable as a service that it provides to applicants for planning approval. Rather it is a power to process applications for the protection and general benefit of the residents of the City. If within the statutory period, the Council considers the application, it is bound to consider various matters and interests which may be contrary to the interests of the applicant and which may result in the refusal of the application. If the application succeeds, the applicant no doubt receives a benefit or advantage. But not every process or activity which results in a benefit or advantage to an individual is a service that is provided to that individual. When the deliberative and quasi-judicial nature of the application process is identified and analysed, it cannot sensibly be described as a "helpful activity" provided by the Council to applicants for planning approval. The Council is an adjudicator, not a servant of an applicant.”

24 And at [16-17] – emphasis added:

“... the appellant contends that, in performing its functions as responsible authority for the purposes of the relevant town planning scheme, the City was providing services of the kind provided by a public authority or a local government body within the meaning of par (e) of the definition of services in s 4(1). He contends that “the refusal to approve the change of use was clearly capable of constituting the refusal of a service”. He submits that, if approving a change of use was capable of being a service, then the Tribunal had not erred in law [28] in finding as a fact that the City had refused to provide a service for the purpose of the Act. In our opinion, this submission must be rejected because **the City did not provide any service of giving planning approval.**

In determining whether a person has refused to provide a service within the meaning of the Act, it is necessary to identify with precision what service has allegedly been refused to that person and what service or services the alleged discriminator provides [29]. **The appellant does not assert, and the Tribunal did not find, that the relevant service which the City provides was the consideration of an application for approval. There was clearly no refusal to provide such a service.** Rather, the appellant asserts that it was the refusal to approve the application that was the refusal of the service which the Council provided. **However, the City did not provide any service of giving approvals. Conversely, it did not provide any service of refusing approvals. The Council, acting on behalf of the City, merely had a duty to consider applications and a discretionary power to refuse or approve those applications unconditionally or on conditions.**

... Clause 40(1) [of the City of Perth Planning Scheme] imposed a duty on the Council to examine applications taking into consideration such matters as “the orderly and proper planning of the locality and the preservation of the amenities of the locality”, and gave it a discretion to refuse or grant the application “unconditionally or subject to such conditions as it may deem fit”. **Thus, the granting or refusal of an application was the end product of a deliberative process. Approval of an application no doubt conferred a benefit on an applicant. But it misdescribes the process to say that the Council provided a service of giving approvals.** Certainly the process was not an “exercise of a discretion to give planning approval to allow the use of premises for a particular purpose in a specific locality” (emphasis added) as the [Equal Opportunity] Tribunal held. Consequently, the Tribunal erred in law and the Full Court [of the Federal Court], although for different reasons, was correct in setting aside the Tribunal's decision.

25 Dawson and Gaudron JJ also dismissed the appeal, reasoning as follows at [24] - emphasis added:

“The appellant's argument that the first respondent's refusal of planning approval was a refusal to provide a service cannot be sustained. Once

the service in issue is identified as the exercise of a discretion to grant or withhold planning approval, a case of refusal to provide that service is not established simply by showing that there was a refusal of planning approval. **Rather, it is necessary to show a refusal to consider whether or not approval should be granted. And that case is foreclosed by the very matter of which the appellant complains, namely, the Council's refusal to grant approval.**"

- 26 Similarly, Gummow J found at [44-45] that the Council had not refused to provide a service, because it had considered the application and refused it.
- 27 The reasoning of the majority in *IW* was applied by the Federal Court of Australia in *Rainsford v Victoria* (2007-08) 167 FCR 1. In that case, Sundberg J dismissed a complaint of discrimination by a person serving a sentence of imprisonment, who alleged that the State of Victoria had failed to permit him proper opportunity to stretch and exercise his back. The complaint was dismissed on the basis that, in providing accommodation for prisoners, the State was not providing a service to them.
- 28 In considering and determining Mr Wade's application to bring a car onto the Island, the Board was exercising an adjudicative function and engaging in a deliberative process, just as a local Council does when determining an application for development or planning approval. Whichever reasoning in *IW* is adopted, the result is the same. The same can be said of the review process. In either case, either the process itself is not a service, as Brennan CJ and McHugh J found, or it is a service which was provided to Mr Wade, notwithstanding the declinature of his application, adopting the reasoning of Dawson, Gaudron and Gummow JJ.
- 29 In respect of the complaint pursuant to section 49ZYN(1), there is no allegation that the service of considering and determining the application, if it is characterised as a service, was provided on terms that discriminated against Mr Wade or his family, whether by charging him a higher fee or otherwise. Mr Wade merely says that, in making its decisions, the Board treated him and his family members less favourably, on the grounds of age or disability, than persons without those characteristics were or would have been treated in the same circumstances, or in circumstances which were not materially different.

Even if that were proven, it does not amount to a difference in the 'terms on which' the service of decision making – if it was a service – was provided.

- 30 The scant evidence before us as to the manner in which the considerations proceeded does not lead to any different conclusion.
- 31 That is so, whether or not the Board's website describes the fees for making applications as fees for a service, and regardless of the intrinsic merits of Mr Wade's application for permission to bring a vehicle to the Island and the Board's decisions in respect of it.
- 32 For these reasons, we are of the view that neither the Board's actions in considering and refusing Mr Wade's application, at first instance and on review, nor the process by which those actions were undertaken by the Board, were capable of amounting to refusal of a service, or discrimination in the terms on which it was provided. That is so, whether one adopts the reasoning of Brennan CJ and McHugh J on the one hand, or of Dawson, Gaudron and Gummow JJ on the other.

Disposition

- 33 Even if the allegations of fact are proven – namely, that the decisions of the Board were unfair, discriminatory, ill-adapted to protect the Island's environment, and failed to have due regard to the law against discrimination and the needs of children – they are incapable of disclosing that the Board refused to provide a 'service' or discriminated in the terms upon which any service was provided. It follows:
- (1) that the proceedings are 'lacking in substance' in terms of section 55(1)(b) of the *Civil and Administrative Tribunal Act 2013*, and section 92(1)(a)(i) of the *Anti-Discrimination Act 1977*; and
 - (2) that the conduct alleged, even if proven, would not disclose the contravention of a provision of the *Anti-Discrimination Act 1977* or the *Anti-Discrimination Regulation 2019*, in terms of section 92(1)(a)(ii).
- 34 That enlivens the Tribunal's powers of dismissal pursuant to section 55(1)(b) of the *Civil and Administrative Tribunal Act 2013* and section 102 of the *Anti-Discrimination Act 1977*. As the proceedings enjoy no prospect of success, we are of the view that they should come to an end.

35 It is unnecessary to consider the Board's assertion that the proceedings should be dismissed on other grounds.

36 Pursuant to section 55(1)(b) of the *Civil and Administrative Tribunal Act 2013* and section 102 of the *Anti-Discrimination Act 1977*, the proceedings are dismissed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar