

Civil and Administrative Tribunal
New South Wales

Case Name: Alghofaili v SAE Institute Pty Ltd

Medium Neutral Citation: [2020] NSWCATAD 215

Hearing Date(s): 5 August 2020

Date of Orders: 2 September 2020

Decision Date: 2 September 2020

Jurisdiction: Administrative and Equal Opportunity Division

Before: C Ludlow, Senior Member

Decision: (1) Leave to proceed with the complaint of discrimination on the ground of race is granted.
(2) Leave to proceed with the complaint of victimisation is refused.

Catchwords: EQUAL OPPORTUNITY – leave to proceed - principles applying to grant of leave – race discrimination in education – ethno-religious origin – victimisation

Legislation Cited: Anti-Discrimination Act 1977 (NSW)

Cases Cited: CZH v University of Technology Sydney [2017] NSWCATAD 82
Dezfouli v Health Care Complaints Commission [2018] NSWCATAD 245
Director General, Department of Education & Training v FP and FQ on behalf of FR (EOD) [2003] NSWADTAP 51
Director General, Department of Education and Training v ZG [2007] NSWADTAP 50
Ekermawi v Administrative Decisions Tribunal of New South Wales & Ors [2009] NSWSC 143
Jones and Harbour Radio Pty Limited v Trad (EOD) [2011] NSWADTAP 1
Omeri v Quality Assurance Services Pty Ltd (No. 2)

[2004] NSWADT 105
Prakash v Bobb Borg Pty Ltd [1999] NSW ADT 73
Tarjali-Diab v NSW Department of Commerce (No 2)
[2005] NSWADT 288

Texts Cited: None cited

Category: Procedural and other rulings

Parties: Sohail Alghofaili (Applicant)
SAE Institute Pty Ltd (Respondent)

Representation: Counsel:
R Kumar (Applicant)
B Byrnes (Respondent)

Solicitors:
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File Number(s): 2020/00114975

Publication Restriction: Nil

REASONS FOR DECISION

- 1 The applicant, Mr Sohail Alghofaili, complained that he was discriminated against on the basis of race by the respondent and subsequently victimised.
- 2 The President of the Anti-Discrimination Board declined both Mr Alghofaili's complaint of discrimination on the ground of race and victimisation. The first complaint was declined pursuant to s 92(1)(a)(iv) of the *Anti-Discrimination Act 1977* (the AD Act) for the reason that the respondent had provided sufficient information to establish that it had taken appropriate steps to remedy or redress the conduct complained of. The second complaint was declined under s 92(1)(a)(vi) for the reason that the complainant had not provided any information which established a connection between the conduct complained of and the allegations of race discrimination.
- 3 The matter is before the Tribunal to determine whether the applicant should be granted leave to proceed under s 96 of the AD Act.

Relevant legislation

4 Section 4 of the AD Act defines “race:

“race includes colour, nationality, descent and ethnic, ethno-religious or national origin.”

5 Section 7 provides and provided at the relevant dates:

“7 What constitutes discrimination on the ground of race

(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of race if the perpetrator:

(a) on the ground of the aggrieved person’s race or the race of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race, or

(b) on the ground of the aggrieved person’s race or the race of a relative or associate of the aggrieved person, segregates the aggrieved person from persons of a different race or from persons who have such a relative or associate of a different race, or

(c) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons not of that race, or who have a relative or associate not of that race, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(2) For the purposes of subsection (1) (a) and (b), something is done on the ground of a person’s race if it is done on the ground of the person’s race, a characteristic that appertains generally to persons of that race or a characteristic that is generally imputed to persons of that race.”

6 Section 17 provides:

“17 Education

(1) It is unlawful for an educational authority to discriminate against a person on the ground of race:

(a) by refusing or failing to accept the person’s application for admission as a student, or

(b) in the terms on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of race:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or

(b) by expelling the student or subjecting the student to any other detriment.

(3) Nothing in this section applies to or in respect of a prescribed educational authority in relation to such circumstances, if any, as may be prescribed."

7 Section 50 provides:

"50 Victimisation

(1) It is unlawful for a person (the discriminator) to subject another person (the person victimised) to any detriment in any circumstances on the ground that the person victimised has:

(a) brought proceedings against the discriminator or any other person under this Act,

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act,

(c) alleged that the discriminator or any other person has committed an act which, whether or not the allegation so states, would amount to a contravention of this Act, or

(d) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.

(2) Subsection (1) does not apply to the subjecting of a person to a detriment by reason of an allegation made by the person if the allegation was false and not made in good faith."

8 Section 53 provides:

"53 Liability of principals and employers

(1) An act done by a person as the agent or employee of the person's principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

(2) If both the principal or employer and the agent or employee who did the act are subject to any liability arising under this Act in respect of the doing of the act, they are jointly and severally subject to that liability.

(3) Despite subsection (1), a principal or an employer is not liable under that subsection if the principal or employer took all reasonable steps to prevent the agent or employee from contravening the Act.

(4) For the purposes of subsection (1), the principal or employer of a volunteer or unpaid trainee who contravenes Part 2A is the person or body on whose behalf the volunteer or unpaid trainee provides services.”

9 Section 92 provides:

“92 President may decline complaint during investigation

(1) If at any stage of the President’s investigation of a complaint—

(a) the President is satisfied that—

(i) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or

(ii) the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations, or

(iii) the nature of the conduct alleged is such that further action by the President in relation to the complaint, or any part of the complaint, is not warranted, or

(iv) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or

(v) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or

(vi) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or

(vii) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint, or

(b) the President is satisfied that for any other reason no further action should be taken in respect of the complaint, or part of the complaint,

the President may, by notice in writing addressed to the complainant, decline the complaint or part of the complaint.

(2) The President, in a notice under this section, is to advise the complainant of—

- (a) the reason for declining the complaint or part of the complaint, and
- (b) the rights of the complainant under sections 93A and 96.”

10 Section 93A provides:

“93A Referral of complaints to Tribunal at requirement of complainant

- (1) If the President has given a complainant a notice under section 87B (4) or 92, the complainant may, within 21 days after the date on which the notice was given, require the President, by notice in writing, to refer the complaint to the Tribunal.
- (2) On receipt of a notice under subsection (1) from the complainant, the President is to refer the complaint to the Tribunal.”

11 Section 96 provides:

“96 Leave of Tribunal required for inquiry into certain matters

- (1) A complaint that is referred to the Tribunal on the requirement of a complainant under section 93A (1) may not be the subject of proceedings before the Tribunal without the leave of the Tribunal.
...”

Factual background

12 The complaint alleges a number of incidents over a period of almost two years. In relation to the allegations of direct racial discrimination, the applicant alleges the following incidents occurred between him and a lecturer, who I will refer to as Mr HX, in around November 2017:

- (1) Mr HX said in a class that religious people have problems with nudity then walked up to the applicant “aggressively” and said “Are you a Muslim, Sohail? Are you a Muslim?” He then explained “Muslims are overly sensitive to nudity”.
- (2) In three subsequent classes he said to the class loudly: “If you are a Muslim, feel free to leave now”.
- (3) During a Life Drawing class he participated in a joke about rich Arab men contacting the female nude model and asking if they could “own” her.
- (4) He arrived late to a class, said that the night before he went to a shop to buy KY (a lubricant) and asked the shop assistant where it was. He said that she asked what it was for and added “by the way she was wearing a hijab” and laughed.

13 On 12 November 2017 the applicant made an appointment to meet with a Student Services officer of the respondent. The meeting took place but there is

no record of what was discussed. The applicant subsequently met with Mr HX as described above. He says that this was at the officer's suggestion.

- 14 At the meeting the applicant told the lecturer his behaviour was unacceptable. According to the applicant's complaint, Mr HX acknowledged this and said he was sorry; he also said that he was seeing a psychiatrist and had a problem with religious people in general because of bad experiences with his parents who were religious. He said that at the meeting Mr HX said he could lose his job if the applicant made a complaint.
- 15 The applicant did not make a formal complaint but on 6 February 2018 he met with two members of SAE management to resolve a delay to his assessments which he said was caused by the above incidents. He states that they said the matter was a misunderstanding and that he was directed not to document the details about Mr HX's alleged behaviour. He was permitted to submit his work for assessment and it was regraded upwards twice. It appears from email correspondence that the assessment issue was then considered closed by both parties.
- 16 Subsequently, however, the applicant said he was treated differently by staff at the Institute. He claims this constituted victimisation. The alleged victimisation consisted of the following incidents.
 - (1) In around March 2018, a different lecturer said while looking directly at him: "the media industry in Australia is very small. If you are a troublemaker, everyone will know about your reputation."
 - (2) Another lecturer allegedly ignored and ridiculed him when he asked questions.
 - (3) When the applicant requested a refund because his lecturer missed five weeks of lectures, he was:
 - (a) Ignored and not given support in later classes by that lecturer;
 - (b) Not supported by management;
 - (c) In May 2019 his registration was confirmed late, resulting in him missing the first lesson;
 - (d) He was not provided with the same access to resources including Google Drive as other students for 2 weeks despite reminders; and
 - (e) When working with a team, after the team leader and the lecturer went out of the room together, the team leader returned and

behaved negatively towards him, stating that he did not need access to Google Drive unlike the other students and said they backed up the Drive daily which he inferred implied he was a threat.

- 17 The applicant also contends that the failure of SAE to deliver the module he was studying in a timely fashion and to a satisfactory level was a form of discrimination and retaliation.
- 18 The applicant claims he has suffered detriment in the form of stress and anxiety, for which he takes medication; and has been unable to continue his degree. This has caused him to lose his investment in coming to Australia to study. He sought compensation from SAE for this loss.

The applicant's submissions on leave

- 19 The applicant submits that his case should be taken at its highest (*CZH v University of Technology Sydney* [2017] NSWCATAD 82). In *Prakash v Bobb Borg Pty Ltd* [1999] NSW ADT 73 at [35] it was said that:

“...the appropriate way forward is to take the Complainant's evidence at its highest point or in other words, and for the purposes of this exercise to accept that everything which the Complainant has put in evidence is true and then determine whether he could possibly succeed in his complaint of racial discrimination”.

- 20 The applicant also cited the case of *Dezfouli v Health Care Complaints Commission* [2018] NSWCATAD 245 in support of his premise that he did not need to make out a prima facie case or provide evidence to support his complaint.
- 21 It is apparent that some of Mr HX's comments referred to “Arabs” while others referred or could be interpreted as referring to Muslims or the Muslim religion. The applicant asserts that he is both Arab and a Muslim. He asserts that the authorities indicate it is open to him to assert that he belongs to one category of Muslims - being Muslims of Arab origin - that were targeted by Mr HX's conduct and remarks, and that this does constitute an ethno-religious group within the definition of race in s 4 of the AD Act.
- 22 The detriment suffered is said to be the remarks which singled out the applicant and his subjection to a learning environment where racism was tolerated. No comparator has been identified by the applicant but it is submitted

that the correct comparator may be identified at the hearing on the merits if leave is granted (*CZH* at [80]).

- 23 In relation to the claim of victimisation, the applicant submits inferences could be drawn that there is a causal link between the alleged mistreatment and his making of the complaint about Mr HX's behaviour.
- 24 The applicant submits that he has put forward the elements of his complaint and it is fair and just to allow the complaint to proceed even if the evidence is perceived to be lacking, as the litigation process would allow an opportunity for further information to be gathered.

The respondent's submissions on leave

- 25 In relation to the complaint of direct racial discrimination, the respondent submits firstly that it has a complete defence to the complaint of direct discrimination because as the employer of Mr HX, it did not authorise him either expressly or by implication to act in the manner described. In the alternative it took all reasonable steps to prevent the alleged acts.
- 26 Secondly it submits that the alleged comments are, taken in context, about Muslims and the Islamic religion, and therefore, are not about "race" and do not come within the definition of "race" in s 4 of the AD Act.
- 27 Thirdly the alleged comments themselves do not constitute detrimental treatment as they were "occasional politically incorrect banter".
- 28 Fourthly the complaint to the Anti-Discrimination Board was only made almost two years after the earliest of the alleged conduct.
- 29 The respondent also disputes some of the facts as alleged by the applicant. As the Tribunal must, for the purposes of the leave application, take the applicant's evidence at its highest, I have not considered which of the differing factual accounts is to be preferred.
- 30 In relation to the complaint of victimisation, the respondent submits that there is no causal nexus between the complaint and the alleged acts of victimisation. They were all committed by persons without knowledge of the applicant's complaints; the passage of time between the complaint and the victimisation;

one of the alleged acts of victimisation is attributed to the applicant's request for a refund; and the alleged detriments are not in fact detrimental.

- 31 Further it is submitted that it is highly unlikely that the applicant would succeed in his claims if the matter went to hearing.

Consideration

- 32 A person may make a complaint to the President on their own behalf alleging that a person(s) has contravened a provision of the Act: (s 87A(1)(a)(i) of the AD Act).
- 33 Section 92 provides that the President may decline the complaint if he is satisfied of any of the matters in that section.
- 34 Where the President has declined a complaint under s 92 of the AD Act, the President must refer the complaint to the Tribunal if he or she has received a written request from the complainant to do so (s93A).
- 35 Where a complaint is referred to the Tribunal on the requirement of a complainant under s 93A(1), as has happened in this case, the complaint may not be the subject of proceedings before the Tribunal unless the Tribunal grants leave (s 96(1)).
- 36 Section 96 of the AD Act gives the Tribunal an unfettered discretion to grant leave for a complaint to proceed, which is not confined to the grounds on which the President declined the complaint, although the Tribunal may have regard to those grounds. That discretion must, however, be exercised having regard to the purpose of the legislative scheme established by the Act and be guided by the consideration that the refusal of leave will finally determine the complainant's rights under that scheme. Leave must be granted or refused depending on what is fair and just in the particular circumstances. It is for the plaintiff to establish that the leave should be granted (*Ekeremawi v Administrative Decisions Tribunal of New South Wales & Ors* [2009] NSWSC 143 at [25-36] [58-61]).

Complaint of discrimination

- 37 To prove direct discrimination on the ground of race, the applicant would have to establish that the respondent treated him less favourably than it treated or

would have treated an applicant of a different race in the same or similar circumstances by subjecting him to some detriment in s 17 of the AD Act. The complaint is that the applicant was singled out for detrimental comments by the lecturer.

- 38 It has been held that subjecting a student to a learning environment where racism is tolerated, failing to recognise remarks as racist, and/or to discourage them constituted a detriment within the meaning of s 17 (*Director General, Department of Education & Training v FP and FQ on behalf of FR* (EOD) [2003] NSWADTAP 51; *Director General, Department of Education and Training v ZG* [2007] NSWADTAP 50). In the light of this finding I consider that the singling out of the applicant in class in front of others and making the alleged comments, some of which were derogatory in nature, could be a detriment.
- 39 The respondent has raised whether the comments can be said to relate to “race” within the meaning of s 4 of the AD Act. The comments included asking the applicant “aggressively” if he were a Muslim in relation to nudity; a comment that Muslims were overly sensitive to nudity; a statement “If you are a Muslim, feel free to leave now”; a joke about rich Arab men contacting a female nude model; and laughing after telling the class about buying lubricant in a shop from an assistant wearing a hijab. The applicant says that he was the only person of Arab nationality or Muslim faith in the class.
- 40 The definition of “race” in s 4 of the AD Act includes nationality, descent and ethnic, ethno-religious or national origin. Arabic descent and ethnicity has been held to come within the meaning of “race”. In *Tarjali-Diab v NSW Department of Commerce (No 2)* [2005] NSWADT 288 the applicant was born in Jordan and was of Arabic descent. In *Omeri v Quality Assurance Services Pty Ltd (No. 2)* [2004] NSWADT 105 the applicant was described as a Muslim from the Middle East but the alleged instances of discrimination did not refer to his religion but to him as an “Arab”. In both cases the Tribunal dealt with the complaints as concerning race discrimination.

41 The issue of whether the term “Muslim” constituted an “ethno-religious” group was considered by the Appeal Panel in *Jones and Harbour Radio Pty Limited v Trad* (EOD) [2011] NSWADTAP 1.

42 The Appeal Panel said:

“While it was argued for Mr Trad that the term "Muslim" may be interpreted, for the purposes of the Act, as referring to "race" we do not accept that view. In *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 209 this Tribunal had to consider the meaning of the term "ethno-religious" in the context of the AD Act. The Tribunal stated (at [18]-[20]):

'18 It is not even clear that Muslims, to use the words of the Attorney-General "share a common racial, national or ethnic origin". While Muslims are all adherents to Islam, they do not share common racial, national or ethnic origins. There are Muslims in every continent and of many different racial and ethnic backgrounds. It is common knowledge for example that there are South Asian, South-East Asian, African, Middle-eastern and European communities of Muslims. Many African-Americans, most famously Muhammed Ali, are Muslims. No doubt within those broader groupings there are further ethnic sub-groups which nonetheless adhere to Islam. Hence the ambiguity in referring to Muslims as a single "ethno-religious" group. For this reason, the examples given in the Second Reading Speech [one of which was that a group of 'ethno-religious origin' would cover Muslims] are not very useful aids to interpretation.

19 It is a fallacy to refer only to ethnicity or to religion in determining whether or not a person belongs to an "ethno-religious" group. It is a short-hand generic description of a complex type of cultural grouping which has ethnic, cultural, historical and religious aspects all entwined. Better examples of what is meant by an "ethno-religious" group than were given in the Second Reading Speech might be, for example, Javanese Christians, Bosnian Muslims or Northern Irish Catholics.

20 It therefore follows that, in our view, there is no very helpful extrinsic material to which we have been referred by either party to construe the meaning of the term. It accordingly falls to us to attempt a definition. We do so, among other things, by taking account of the objects of the Act. In our opinion, the term signifies a strong association between a person's or a group's nationality or ethnicity, culture, history and his, her or its religious beliefs and practices . (Emphasis added.)'

124 That approach has consistently been adopted by the tribunal at both first instance and appeal panel and in we are not persuaded by Mr Trad's argument that we should depart from that approach in these

Reasons. (see for example *Toll Pty Limited trading as Toll Express v Abdulrahman* [2007] NSWADTAP 70 at [8]; *Kunhi v University of New England* [2008] NSWADT 333 at [4].)

125 Whether as Mr Trad contends the term "Muslim" when used in Sydney in 2005 in the context of the offending broadcast was understood by the audience to be interchangeable with the term "Lebanese Muslims" or "Lebanese people" is a question of fact to be determined by reference to all of the circumstances surrounding its use. This however is a separate issue to whether for the purpose of the Act adherents of the religions of Islam or "Muslims" constitute a race."

- 43 Only one of the comments refers expressly to race; the others refer to religion. However there is a connection between the comment about rich Arab men and the comment about Muslims being uncomfortable with nudity as they both related to nudity. It is also possible to infer, as the lecturer singled out the applicant in the class to ask him if he was Muslim, that he was singled out as being the only person of Arab descent in the class. For those reasons I consider that the applicant may be able to establish that at least some of the comments were made to him as a Saudi-Arabian and as a Saudi-Arabian Muslim in one or more cases.
- 44 While the applicant has not identified a comparator, this in itself is not a reason for refusing leave, as identified in *CZH*.
- 45 The lecturer is not named as a respondent to the complaint. As his principal or employer, the respondent may be found to be vicariously liable for his conduct, however, unless it did not authorise him either expressly or by implication, to do the acts complained of. This and any defence that the respondent claims, is a matter which should be determined at the hearing, if the matter proceeds.

Victimisation complaint

- 46 In order to establish his claim of victimisation, the applicant must establish that he was subjected to a detriment by the respondent on the ground that he had alleged that the respondent or the lecturer had committed an act which would contravene the AD Act.
- 47 The applicant claims that the detriment he suffered was less favourable treatment by a different lecturer, less access to resources and denial of a refund request which he experienced in 2019.

- 48 The respondent disputes that this conduct, if it did occur, could be attributed to the complaint made by the applicant in 2017-18.
- 49 I am not satisfied that the applicant could succeed in establishing that the respondent subjected him to detrimental treatment because of his complaint. In my view one cannot reasonably infer a connection between his complaint and the actions, as the only basis for such an inference is that the lecturer who was the subject of the complaint was well liked. Some of the alleged victimisation also occurred after he requested a refund.
- 50 In these circumstances the Tribunal cannot be satisfied that there is evidence of the causation required for the applicant to make out his complaint of victimisation.

Conclusion

- 51 The applicant has not established that it would be fair and just to grant leave for the complaint of victimisation to proceed, as it lacks substance and a causal connection between the complaint and the conduct.
- 52 In relation to the complaint of discrimination in education on the ground of race, I am satisfied that the applicant has an arguable case. The respondent has raised additional factors which are relevant to whether leave should be granted, however.
- 53 Firstly the respondent claims it has taken appropriate steps to remedy or redress the conduct complained of. The respondent submits that it facilitated an apology from Mr HX; issued him with a verbal warning; counselled him; required him to attend cultural diversity training and monitored his performance. At the same time, however, it disputes that some of the conduct attributed to Mr HX occurred. There is a dispute about whether the applicant was consulted about and agreed with the remedial actions taken. The dispute is a matter of evidence and should be resolved through a hearing.
- 54 Secondly the alleged discrimination occurred around November 2017, almost three years ago. There is no evidence that this unduly prejudices the respondent, however.

55 In my view the applicant should be permitted to proceed with his complaint of racial discrimination only.

Orders

- (1) Leave to proceed with the complaint of discrimination on the ground of race is granted.
- (2) Leave to proceed with the complaint of victimisation is refused.

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

Amendments

04 September 2020 - Case Title and Representation corrected