

JURISDICTION: ANTI-DISCRIMINATION TRIBUNAL

CITATION: *Freeman v Cornish Mount No 24 Pty Ltd t/as Men's Gallery* [2019] TASADT 5

PARTIES: FREEMAN, Sarah
v
CORNISH MOUNT NO 24 PTY LTD T/AS MEN'S GALLERY

HELD AT: Hobart

REFERENCE NO(S): A/2017/6

HEARING DATE(S): 4 September 2018

DELIVERED ON: 15 August 2019

REFERRING SECTION(S): 78

DECISION OF: Tribunal Member Mills

CATCHWORDS: Prohibited conduct – offensive, humiliating, insulting, ridiculing conduct – public act done in good faith – artistic

Anti-Discrimination Act 1998 (Tas), s16, 17, 20, 22, 55, 99; *Brinkley v. Metro Tasmania Pty Ltd* [2005] TASADT 14; *Wood v Gerke & Ors* [2007] TASADT 03; *Durston v. Anti-Discrimination Tribunal (No. 2)* [2018] TASSC 48

DETERMINATION: Complaint is dismissed.

REPRESENTATION:

Complainant: Self-represented
Respondent: D. Loganathan (Crotty Legal)

REASONS FOR DECISION

History of Complaint

1. Ms Sarah Freeman (the Complainant) made a complaint to the Anti-Discrimination Commission (ADC) on 18 August 2016 alleging that the image of a pole-dancing woman outside the Men's Gallery was an overly sexualised image to have on public display. Further, the Complainant found this offensive, humiliating and distasteful.
2. The Anti-Discrimination Commissioner accepted the complaint and investigated the matter on the basis that the complaint possibly disclosed a breach of ss.17(1), 16(e) and 22(1)(c) of the *Anti-Discrimination Act* (the Act). Section 17(1) relevantly concerns the prohibition of certain conduct; s.16(e) relates to discrimination on the grounds of gender and s.22(1)(c) prescribes the areas of activity which must be satisfied for complaints of discrimination and prohibited conduct.
3. The Cornish Mount No. 24 Pty Ltd trading as Men's Gallery (the Respondent) did not provide a response to the complaint during the investigation process. The Anti-Discrimination Commissioner referred the complaint to the Anti-Discrimination Tribunal (the Tribunal) on 14 March 2017.
4. The complaint was heard at Inquiry on 4 September 2018.

Inquiry Hearing

The Complainant's Case

5. The Complainant gave evidence on oath and was cross-examined. The Complainant stated that she was initially surprised that the sign depicting a scantily clad woman in a sexualised position pole-dancing was allowed to be on display to the public at the Cornish Mount Hotel. The Complainant tendered a photograph of the sign and of the hotel indicating the position of the sign outside the hotel building.
6. The Complainant said that she was significantly offended so that she felt she needed to make a complaint about the sign. She was upset that her children had to see the sign as it was on a busy main road in the city and was difficult to avoid.
7. The Complainant said she felt embarrassed and felt that the sign belittled and diminished what it was to be a woman. The Complainant was also concerned that she didn't have a choice because it was right there and was difficult to avoid.
8. The Complainant stated she did not believe it was necessary for the sign to be so confronting to merely advertise the business.
9. The Complainant, when asked whether she regarded the sign as artistic, stated that this was not normally seen as art and it would be unusual for it be art.

10. The Complainant explained that she had not complained earlier about the sign which has been in place for approximately 5 years because of family health issues.
11. The Complainant agreed that some women probably attended the hotel and that this was an adult entertainment place, but said she regarded the sign as overly sexualised and whilst she had seen similar images in the community, this was more extreme.
12. The Complainant was questioned as to whether she had seen “girlie magazines” in newsagents, but said you there had the choice not to look at them.
13. The Complainant was shown a number of other pictures of signs advertising adult entertainment and it was put to her that such signs were allowed by the Advertising Standards Bodies. The Complainant said that she did not know what test governed the advertising regulatory bodies and would be interested to know how that matched with the *Anti-Discrimination Act* and disagreed that the test that the advertising bodies used was stronger than the *Anti-Discrimination Act*.
14. When questioned, the Complainant agreed that it was legal to have adult entertainment businesses and that they were allowed to advertise, however, it was her view that this could be done in a less offensive way.
15. The Complainant submitted that the sign was overly sexualised and it could have been less so, that it was extreme for our culture in Tasmania and that if she walked down the street dressed in the same manner as the woman on the sign it would be indecent.
16. The Complainant acknowledged that the Respondent’s business at the Cornish Mount was well run and the issue was not about the business, but about what you could see from the street. The Complainant was concerned about the pose of the woman in the sign and stated that it was not what you would see on the street or in other advertising.
17. The Complainant said she did not regard the sign as normal and it was in such an obvious place where you would not normally expect to see such a sign. She conceded that it was not full nudity, but believed the sign went too far.
18. The Complainant said she was aware that friends and family orientated persons needed to walk past the sign when accessing the cinema and Centrelink and Medicare offices and that a wide section of the community therefore were forced to see the sign.
19. The Complainant acknowledged that some groups would find the sign acceptable, but said she believed a significant group still found it confronting and that it was not within their background or culture and that many from other cultural groups would find it even more confronting. The Complainant said that the sign was so eye-catching it was unusual for Hobart. Further, that you had no choice about seeing the sign, whereas you do have a choice about going into the business.
20. The Complainant tendered her complaint form to the Anti-Discrimination Commission and the Commissioner’s s.79 Referral report and the Decision and Reasons for accepting her complaint.
21. The Complainant, in her complaint to the Anti-Discrimination Commissioner, sought the removal of the sign or replacement of the sign with a less explicit one.

The Respondent's Case

22. The Respondent also tendered a close-up photo of the sign.
23. The Respondent tendered photos of other advertising signs for adult entertainment businesses together with a bundle of case reports from the Advertising Standards Board regarding complaints made against such signs. In all of those decision, the Advertising Standards Board had dismissed the complaints which had been made on similar grounds to the present matter.
24. The Respondent also tendered the AANA (Advertisers) Code of Ethics and the Code of Ethics Practice Note. In addition, the Respondent tendered a colour photograph of the sign in issue in this matter.
25. Ms Kate Elizabeth Nancarra gave sworn evidence for the Respondent. Ms Nancarra is a Director of the Respondent and manages the business known as the Men's Gallery. Ms Nancarra had undertaken this role for the past three years.
26. Ms Nancarra outlined the business which was run including the performances by girls which included lap pole dancing and strip dances. Ms Nancarra outlined that the dancers wear lingerie very similar to what is shown on the sign and that the dancers range in age from 18 years to 44 years with about 25 women being on the roster in 2018.
27. Ms Nancarra outlined the steps taken to ensure that the business was properly run and provided a safe place for the performances. She stated that the clientele of the business included locals and tourists and that it provided a place to socialize and also drink alcohol. She said that at times they had had amongst their patrons groups of women celebrating Hen's Parties. Further, that there was adequate security in the building to ensure the patrons did not drink too much and that everyone was safe.
28. Ms Nancarra outlined some of the policies of the business, namely that the dancers who were all female, had strict rules that there was to be no touching by the patrons of the dancers and no photographs taken and that the venue was strictly monitored with cameras.
29. Ms Nancarra gave evidence that the dancers believe they are doing a job and that what they wear and what they do is not discriminatory, and that they have pride in their work.
30. Ms Nancarra stated that the sign "is the business" and that when you walk in, patrons would see girls wearing exactly the same as on the sign and that they would do pole dances wearing the same garments.
31. Ms Nancarra said that she had spoken to the dancers about the sign and their view was that it was nothing more than what you would see at the beach or in the newsagent in a Penthouse magazine. It was just advertising to let people know what the business did.
32. Ms Nancarra gave evidence that a similar business was operated in Launceston with similar signs and that there had not been any complaints to the Advertising Standards Board. Her view was that the sign was a marketing tool to tell people what the business was about.
33. Ms Nancarra said that the dancers took pride in their work and felt empowered by what they did and proud of their bodies. Ms Nancarra stated that the business has very

minimal advertising and that the sign is really only strongly visible at night when it is lit up and is key to their business promotion.

34. Ms Nancarra said that she did not believe the sign was discriminatory or offensive, noting that society had changed and that she thought women were supposed to feel empowered by their bodies.
35. Ms Nancarra said she had not received any complaints from members of the public and noted that in other States there were often strip clubs side-by-side and that this business was on the outskirts of the CBD and it was people's choice whether or not to go to the business.
36. The Respondent also called Elizabeth Garth who gave sworn evidence that she worked at the business as a dancer and spoke highly of the way it was managed. Ms Garth said the sign was similar to what she wore at work, that the girls she worked with were proud to look and feel the way they did and she did not believe the sign was overly sexualised. The pole was a prop to help the dancing and was not sexually used. It was not degrading and she was comfortable with wearing her outfit and said that other dancers had told her that the outfit on the sign was a little outdated and should be updated. Further, that the sign is actually more conservative than is at other venues interstate. Ms Garth did not feel offended at all by the sign.
37. Mr Loganathan submitted that the sign was appropriate for the business which was a gentlemen's club and that there was no discrimination, women also attended, and it was a legitimate and properly run business. He submitted that there had been no other complaints of discrimination.
38. The Respondent relies on the decisions by the Australian Advertising Standards Board dealing with similar complaints of advertising described as offensive and sexist. The decisions which were submitted were all decisions where the complaints had been dismissed and the Respondent submits that this should be given considerable weight in considering the current matter.
39. The Respondent's submission was that the sign was a legitimate sign for a legitimate business because it was in fact an adult entertainment business with pole-dancing by women. As such, it did not breach the Act and was just an expression of the nature of the business like "a picture paints a thousand words" and needed to be taken in the context of the nature of the business.
40. The Respondent also relied on s.55 of the Act noting that there was no definition of artistic form and a wide definition should be adopted and that if this applied, then the sign would be an artistic form.
41. The Respondent submitted that the complaint should be dismissed as there was no breach of the Act.

Findings of Fact

42. I observed that the Complainant was genuine in the views that she expressed and clearly felt that the sign was offensive and that it was confronting for her and she was distressed that she could not avoid seeing the sign given it was on a busy street. The Complainant genuinely believed that the sign was humiliating and insulting to women and to her.

43. The Respondent's witnesses also genuinely believed that the sign was not offensive or humiliating to women and that it properly depicted the nature of the business and was therefore appropriate.
44. There is no dispute about the existence of the sign and no dispute that the photos tendered accurately represent the sign at issue in this matter.
45. The sign depicts a lifelike scantily clad woman in a dance pose beside a pole representing 'pole dancing'. It is clearly visible from Barrack Street, a busy Hobart street.

Reasons for Decision

Discrimination

46. The Complainant's complaint to the Anti-Discrimination Commissioner alleges discrimination on the basis of gender and also parental status. Section 14 of the Act deals with direct discrimination. Breach of this section requires the Complainant to be treated less favourably on the basis of an attribute, in this case her gender and/or her parental status, than a person without those attributes.
47. There has been no treatment of the Complainant which could be construed as treating her less favourably because of her gender and/or her parental status. The fact that a sign exists outside a hotel on a public street is not sufficient to amount to treatment directed at the Complainant. There is therefore no breach established of s.14 of the Act, namely direct discrimination.
48. Section 15 of the Act deals with indirect discrimination. This would be established if the Respondent imposed a condition or requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who share the same attributes as the Complainant, or share any of the characteristics imputed to that attribute, namely the Complainant's gender as a woman and her parental status, more than a person who is not a person of the same gender and parental status.
49. In this case, the Respondent has not imposed any condition, requirement or practice affecting the Complainant. All that has occurred is that an advertising sign is displayed outside the Respondent's premises on a public street. There is no breach established of s.15 of the Act – indirect discrimination.

Prohibited conduct

50. Section 17 of the Act states:

"Section 17

- (1) *A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in s.16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed."*

51. The relevant attribute relied on by the Complainant is the Complainant's gender (s.16(e)) and parental status (s.16(i)).

52. I am satisfied that the Complainant has those attributes, namely her gender is female and she is the parent of children.
53. The Act only applies to prohibited conduct in certain circumstances. It will only apply if the prohibited conduct occurred:

“by or against a person engaged in, or undertaking any, activity in connection with any of the following:

- (a) employment;*
- (b) education and training;*
- (c) provision of facilities, goods and services;*
- (d) accommodation;*
- (e) membership and activities of clubs;*
- (f) administration of any law of the State or any State program;*
- (g) awards, enterprise agreements or industrial agreements.”*

54. The sign which is the subject of this matter advertises entertainment at the Respondent’s hotel which clearly falls within the provision of facilities, goods and services satisfying the requirement of s.22 of the Act.
55. It is now necessary to consider whether the sign constitutes conduct in breach of s.17 of the Act.
56. Section 17 requires that an objective test be used to measure whether the placing of the sign outside the Respondent’s premises adjacent to a public street is such that a reasonable person having regard to all the circumstances, would have anticipated that the Complainant would be offended, humiliated, intimidated, insulted or ridiculed.
57. The relevant circumstances to consider are the conduct of the Respondent in placing its advertising sign of a scantily clad pole dancing woman on the outside wall of its premises adjacent to a public street and in a position where it will be readily seen by all passers by. It is also a relevant circumstance to consider that this is an advertising sign and is advertising activities which occur at the hotel. The activities are legal activities.
58. I recognise that some members of the community would share the Complainant’s views regarding the Respondent’s sign and would be offended and/or humiliated by seeing the sign. But the test required under s.17 requires an assessment of whether “a reasonable person” having regard to all the circumstances, would anticipate the Complainant being offended and/or humiliated, insulted or ridiculed. There is no suggestion that intimidation is relevant to this case.
59. The Tribunal found in *Brinkley v. Metro Tasmania Pty Ltd* [2005] TASADT 14 that graffiti in a terminus toilet constituted prohibited conduct under s.17 of the Act in circumstances where the comments were “clearly offensive, humiliating, intimidating, insulting and ridiculing to the complainant and in the circumstances of this case a reasonable person would have anticipated that the complainant would be offended, humiliated, intimidated, insulted or ridiculed”. However, the graffiti contained explicit

swear words and derogatory comments regarding lesbians. The sign in this case does not fall within the same category.

60. In the Tribunal decision of *Wood v. Gerke and Ors* [2007] TASADT 3, the Tribunal was concerned with a complaint regarding naked images of women in very sexualised positions being mounted on the bonnets of trucks. The complaint in that matter did not concern s.17 of the Act, but was focused on the provisions of s.19 of inciting hatred. The Tribunal found that some of the images could be regarded as offensive to some members of the community while others “would respond with disapproval regarding the images as inappropriate or unsuitable as displayed in the circumstances under consideration”. The Tribunal went on to find that there was no breach of s.19 of the Act. The images involved in that decision were more sexualised than the sign in this case and included images of naked women, topless women and women in sexualised positions. The image on the sign in this matter does not fall into that category.
61. There is in this matter no complaint that the sign incites others to hatred and therefore it is not necessary to consider s.19 of the Act. In any event, I do not believe that such a complaint could be substantiated.
62. Section 17 was also considered by the Supreme Court of Tasmania in the decision of *Durston v. Anti-Discrimination Tribunal (No.2)* [2018] TASSC 48. This case involved dissemination of a pamphlet warning that homosexuality should not be tolerated. At para 63, Brett J. referred to s.17:

“Section 17(1) is also a provision which prohibits conduct. By its terms, it is apparent that the provision has an extremely wide ambit of operation. Some aspects of this are as follows:

- (a) *The scope of conduct is unlimited. It encompasses any conduct which falls within the description contained in the section. However, the section will almost always be concerned with conduct which involves communication in one form or another. It follows that the section has the capacity to burden the implied freedom by restricting communication in a wide variety of circumstances.*
- (b) *Read literally, the words ‘offends, humiliates, intimidates, insults or ridicules’ are vague terms which have the potential to encompass a broad range of subjective emotions and feelings. The emotional response will vary from one person to another. However, judicial interpretation of the words “offend, insult, humiliate or intimidate” in respect of similar but not identical provisions under s.18C of the Racial Discrimination Act 1975 (Cth) suggests that the operation of the section is more restricted than the literal meaning of the words would suggest. In *Eatock v. Bolt* [2011] FCA 11,003, 197 FCR 261, Bromberg J. endorsed judicial statements which require the conduct caught by s.18C to have “profound and serious effects and not to be likened to mere slights.”*

63. I have had regard to the context in which the sign appears and the purpose of the sign, and the sign itself which does not show a naked woman, even though the woman is scantily clad it does not show her full breasts. The woman’s pose, whilst sexualised, depicts her pole dancing, an activity which various members of the public engage in.

Further, I note there have been no other complaints regarding the sign. I accept that some members of the public will feel a level of distress and concern about the sign, but I do not believe that an ordinary reasonable person, whilst they might find the sign distasteful, would be concerned to the extent that they would be offended, humiliated, intimidated, insulted or ridiculed. On this basis, I do not find that the placing of the sign in this matter constituted prohibited conduct pursuant to s.17 of the Act.

Section 20

64. Section 20 of the Act prohibits a person displaying any sign or advertising matter that “promotes, expresses or depicts discrimination or prohibited conduct”. For the reasons stated above, there has not been any discrimination or prohibited conduct proved in this matter and I find there has been no breach of s.20 of the Act.

Section 55

65. The Respondent contended that s.55 of the Act which provides for an exemption for “a public act done in good faith for ... artistic ... purposes or any purpose in the public interest”. The Respondent contends that the sign is a public act done in good faith for artistic purposes.
66. I find that the placing of the sign is a public act done in good faith but I am not persuaded that the sign falls within the definition of ‘artistic’ for the purpose of s.55.
67. The sign is advertising material and for that purpose it is a public act and having regard to the evidence of the Respondent, that advertising was done in good faith for the proper purposes of advertising their business. This does not make the sign artistic. Further, the nature of the sign with its likeness to real life does not support it being artistic.

Orders

68. For the reasons stated in this Decision, I am not satisfied that the Respondent has breached the Act in any respect and accordingly find the complaint is unsubstantiated and it is dismissed pursuant to s.99(1) of the Act.


A. MILLS
TRIBUNAL MEMBER