
TRANSCRIPT OF PROCEEDINGS

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ANTIDISCRIMINATION LIST

Number A 241 of 2003

MELBOURNE

MONDAY, 7 JULY 2003 AT 2.37 PM

JUDGE M. HIGGINS, Deputy President

MICHAEL LIPSHUTZ

Applicant

- and -

MELBOURNE UNDERGROUND FILM FESTIVAL

Respondent

EXTRACT OF PROCEEDINGS

MR S.L. TATARKA appeared on behalf of the Applicant

MR P.H. CLARKE appeared on behalf of the Respondent

PROCEEDINGS RECORDED BY VCAT

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HIS HONOUR: This is an application for an interim order pursuant to s.131 of the Equal Opportunity Act 1995. The applicant is one Michael Lipshutz. It seeks orders against the Melbourne Underground Film Festival. It relates to two films and an audiovisual link-up with one David Irving.

The application: the application to this tribunal for an order is dated 2 July 2003. The complaint is of racial and religious vilification under the Racial and Religious Tolerance Act 2001 Victoria, herein referred to as the R and RT Act. The matter came on before me at very short notice on 3 July 2003. Retained on the tribunal file was a fax transmission sheet dated 2 July 2003 from the Equal Opportunity Commission of Victoria to an officer of VCAT confirming that the complainant had that day, that is 2 July, lodged with the Equal Opportunity Commission complaints under the R and RT Act against the Melbourne Underground Film Festival.

Enclosed with this fax transmission was a letter from the Equal Opportunity Commission, herein after referred to as EOC, dated 5 June 2003 confirming lodgment of the complaint. The letter is addressed to the applicant. Although I was concerned with regard to the date of this letter I am now told and I think it is accepted by both parties that this was a typographical error and nothing should be made of that fact.

The nature of the release sought: Mr Dreyfus confined his applications to ss.131(1), sub-ss.(2) and (3) of the Equal Opportunity Act 1995. Sub-s.1(1) provides the complainant or the commissioner may apply to the tribunal, that is VCAT, for an interim order on

two grounds: firstly to prevent any party to a complaint from acting in a manner prejudicial to negotiations or conciliation following a complaint; secondly acting in a manner prejudicial to any decision or order the tribunal might subsequently make.

The act provides in sub-s.(2) that an application may be made at any time before the complaint is referred to the tribunal. Further sub-s.(3) provides that in making an interim order the tribunal must have regard to: (a) whether or not the complainant has established a prima facie case with respect to the complaint; (b) any possible detriment or advantage to the public interest in making the order; and (c) any possible detriment to the complainant's case if the order is not made.

The statutory procedure for dealing with complaints of this nature: The R and RT Act was introduced by Act Number 47 of 2001. It seeks to create various protections to individuals among other matters against racial vilification, s.7, and religious vilification, s.8. As a matter of procedure it makes consequential amendments to the Equal Opportunity Act 1995 and importantly incorporates some provisions of the Equal Opportunity Act.

It does so by reason of the operation of s.23 of the R and RT Act which requires the substantive relief provided by the act to apply to any complaint made under the act as if it were a complaint lodged under s.105 of the Equal Opportunity Act. Part VII of the Equal Opportunity Act 1995 sets out a procedure as to how complaints of this nature are to be dealt with. The

Equal Opportunity Commission may decline to hear the complaint, see s.108; may refer the complaint for conciliation, see ss.112 and 114. If the commission does not consider it reasonably possible to successfully conciliate the complaint there is provision after notice to the parties whereby the complainant may require the commission to refer the matter to the tribunal, see the provisions of s.113.

It is apparent that ss.131(1) and 131(2) are designed to provide a degree of protection to a complainant or the commission where negotiations or conciliations are taking place. That being the case and given the fact that the two films are to be shown days from this date at the festival, the first ground set out in s.131(1) would be irrelevant unless such conciliation or negotiation could occur in such a short time.

This process could not proceed beyond the dates that the films are intended to be shown because in my view it would effectively mean that they are withdrawn certainly from the point of view of this particular festival. I understand that the Melbourne Underground Film Festival is an annual event. Nothing that I have heard today convinces me that there are any negotiations or process of conciliation in place or likely to be in place and in respect of which an interim order would cause any difficulty. Insofar as that aspect is concerned I do not propose to grant an interim order.

I turn to the second aspect of s.131 insofar as the grant of an interim order would prevent the respondent from acting in a way prejudicial to any decision or order the tribunal might subsequently make. It is clear

that this is a difficult matter. The probability is that unless some order is otherwise made, the films will be screened before the tribunal could reach a decision. Assuming that no hearing could commence and conclude prior to either screening the effect of granting an interim injunction would effectively finally decide the issue against the respondent.

In this case we are dealing with a film festival that has published its program. That program deals with actual dates of films, locations, prices, and in fact advance ticket sales. S.131(2) is obviously intended to allow an application to be made for an interim injunction at an early date so as to prevent a person acting before the tribunal is able to hear the substantive issue.

It assumes that a matter may be deferred by the grant of an injunction pending final hearing. That is both sensible and practical. However that is not the position here.

There is authority that indicates that in such a situation a court, and I believe the tribunal is in no different position from a court, would be entitled to consider not whether there was merely a prima facie case or a serious issue to be tried but whether the person seeking the relief would be likely to succeed at the trial, see *Lancing Lind Ltd v Kerr* (1991) 1 All ER 418.

However I do not believe it is necessary to go so far because in my view the complainant has not made out a prima facie case upon which he seeks an interim injunction or order and I shall deal with the matters in turn. Firstly the screening of the film "Search for

Truth in History": in so doing I have not had the benefit of viewing the film. I have had regard to the details under the heading Complaint Details provided by the applicant.

I have had regard to the program printed by the festival's advisers and the provisions of the Racial and Religious Tolerance Act 2001. Both s.7 and s.8 prohibit on the grounds of race or religious belief or activity of another person or class of persons any conduct that incites hatred against, serious contempt for, or revulsion, or severe ridicule of that other person or classes of persons. The material before the tribunal indicates that the "Search for Truth in History" is an address by David Irving which sets out his view consistent with his previous work, which denies the existence of the holocaust.

It is in the form of a video. It was recorded in 1993 apparently following his ban from visiting Australia. The video film is accompanied by the following commentary:

"We at MUFF don't agree with his opinions; more the right for him to hold them and to have them. If you don't protect unpopular speech what kind of speech do we hope to protect exactly? See what these people have to say. Talk about it and be glad that you still have the right to hear them say it."

The objects of the act are as follows:

"(a) to promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy; (b) to maintain the right of all Victorians to engage in robust discussion of any matter of public interest, or engage in or comment on any form of artistic expression, discussion of religious issue, or academic debate, where such discussion, expression, debate, or comment does not

vilify or marginalise any person or class of persons; (c) to promote conciliation and to resolve tensions between persons who as a result of their ignorance of the attributes of others and the effect that their conduct may have on others vilify others on the ground of race or religious belief or activity and those who are vilified."

Sub-s.(2):

"It is the intention of parliament that the provisions of this act, that is the Racial and Religious Tolerance Act 2001, are interpreted so as to further the objects which are set out in sub-s.(1)."

It is also important to refer to the preamble to the act which is in the following terms:

"(1) the parliament recognises that freedom of expression is an essential component of the democratic society and that this freedom should be limited only to the extent that can be justified by an open and democratic society. The right of all citizens to participate equally in society is also an important value of a democratic society.

(2) the people of Victoria come from a diverse ethnic and indigenous backgrounds and observe many different religious beliefs and practices. The majority of Victorians embrace the benefits provided by this cultural diversity and are proud that people of their diverse ethnic, indigenous, and religious backgrounds live together harmoniously in Victoria.

(3) however some Victorians are vilified on the ground of their race or their religious belief or activity. Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, indigenous, and religious backgrounds. It diminishes their dignity, sense of self-worth, and belonging to the community. It also reduces their ability to contribute to or fully participate in all social, political, economic, and cultural aspects of society as equals; thus reducing the benefit that diversity brings to the community.

(4) it is therefore desirable that parliament enact law for the people of Victoria that supports racial and religious tolerance."

It was argued that although the tribunal had not viewed either video or films I should be satisfied that the complainant has established a prima facie case. In my view the complainant carries such an onus in so proving that fact. The affidavit of the complainant refers to the content of the video. I assume by reference to the detail that he has viewed that video. I accept for the purpose of this argument that the various references which are referred to in the complaint details in fact exist.

However the conclusions which have been reached by the complainant after listing various specific references are matters that I have difficulty in determining. Some of the references are quite bland, eg "Our traditional enemies, you know who they are," references to Jewish organisations, gang liars, international organised Jewish community. There is a reference to survivor testimony being a matter of psychological or psychiatric examination and a reference to dining out on the holocaust.

Without observing the context of these comments it is difficult for me to determine if they in effect amount to vilification. Further I find it is difficult to accept the complainant's final conclusions which are set out in the document filed with the tribunal. For example one conclusion is as follows: "It is difficult to conclude other than the speech spreads contempt towards Jews in Australia, seriously vilifies Jews, and has the potential to incite individuals who have become steamed up to engage in physical anti-Jewish activities."

That of course is not to say that there are in the material offensive references to the Jewish people but I do not find that they constitute racial or religious vilification or justify the conclusion drawn by the complainant either when they are viewed individually or globally.

I also note that the complaint seeks to establish both racial and religious vilification pursuant to ss. 7 and 8 and that this section contains no reference to intention.

The position of intentionally performing such acts is dealt with in ss.24 and 25 and it imposes criminal penalties together with the fact that the prosecution for an offence against sub-s.(1) must not be commenced without the written consent of the DPP. No relief is specifically spelt out in the act in respect of ss.7 and 8 and I therefore conclude having regard to s.23 such relief is governed by s.136 of the Equal Opportunity Act.

S.136 is an interesting section in that it confers powers on the tribunal where it finds for the complainant on the substantive issue in that it may order: (a) the respondent refrain from committing further contraventions of the act; (b) order compensation to the complainant for loss, damage, or injury suffered in consequence of the contravention. It follows that if an injunction is refused the complainant still has recourse to s.136 by way of remedy.

It should also be noted that as previously indicated what is alleged against the Melbourne Underground Film Festival is that it is screening the

views of Irving in circumstances where it does not accept his opinions but seeks to uphold his right to express them in accordance with one of the objects of the act; namely that people have the right to freedom of expression.

That statement which is a rejection of Irving's views about the holocaust undoubtedly finds widespread support in this and many other countries. Having regard to all of the material I am not satisfied that the action of the festival organisers requires the grant of an interim injunction on the grounds that it would be prejudicial to any decision or order that the tribunal might subsequently make.

Further in the circumstances I do not see any possible detriment to the public interest or the complainant's case if the order is not made. I make one final observation. I was referred by Mr Dreyfus to two Federal Court decisions: Jones v Sculley (2002) FCA 1080, and Jones v Tobin (2002) FCA 1150. Neither case involved the issue of the grant of an interim injunction. They were both substantive hearings involving material placed upon the Internet and the distribution of material similar to that contained in the earlier case.

In my opinion both cases are quite distinguishable from this application. That is not to say that the substantive findings, given that all of the material is before a tribunal would be different. I was also referred to Irving v Penguin Books Ltd (2000) QB 115 where Irving in fact lost an application in defamation. In that case there were adverse findings made against

him by the court. Again the same findings may eventually be made against him by this tribunal but the conclusions drawn in Irving v Penguin Books Ltd are not and cannot be binding upon this tribunal at this time. They may be conclusions supported by many people in the country but that is as far as the matter can be taken.

I turn now to the issue of the audio which is to be conducted at the conclusion of the film. I am told this morning that Mr Irving will speak and in turn the audience will be given an opportunity to question him with regard to the material which has been placed before them. The tribunal has no idea as to what Irving may say and in those circumstances I cannot see any grounds upon which the tribunal could make an interim injunction preventing that activity taking place. Indeed assuming there is material in the video which may offend members of the community such a course, that is asking questions would be welcomed.

Gentlemen, I have not dealt with and I have not had an opportunity to deal with the final matter which we have heard this morning and this is as I understand it is merely the Arakat video that is going to be played. I have read in the program the summary of this video. The following is recorded:

"Saeb Arakat a seasoned writer and commentator who has often appeared on America television gives an interesting and insightful perspective on a seemingly intractable Israel-Palestinian conflict. Taking aim at the hypocrisy of the US policy in the Middle East he says that US support for Israel's brutal oppression of Palestinians is a betrayal of the ideals that America claims to uphold."

I can find no basis upon which the above could be said to constitute racial or religious vilification.

There is a reference to the holocaust story as justifying support for Israel. Without seeing the film and observing the context of this statement in order to determine whether inferentially it amounts to vilification either by reason of race or religion there are simply no grounds to support such a conclusion and I can find no basis for an interim injunction pursuant to s.131 in respect of the showing of that film. Accordingly the complainant's applications pursuant to s.131 are dismissed.

ADJOURNED 3.05 PM

