IW v. City of Perth

[1997] HCA 30; 191 CLR 1; (1997) 94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943

Country: Australia
Region: Oceania
Year: 1997
Court: High Court
Health Topics: Disabilities, HIV/AIDS, Hospitals, Infectious diseases
Human Rights: Freedom from discrimination

Facts

IW was a member of the incorporated association known as People Living With AIDS (WA) Inc. (PLWA). PLWA applied for planning approval from the City of Perth for the use of premises as a daytime drop-in center for persons infected with or affected by HIV/AIDS. The City, via its executive body, the Council, refused the application by 13:12 votes. PLWA subsequently appealed to the Minister for Local Government and the application was approved. Notwithstanding this approval, the PLWA, joined by three of its individual members including IW, complained of discrimination by the Council to the Equal Opportunity Commission. The matter was then referred to the Equal Opportunity Tribunal of Western Australia (the Tribunal), which found, inter alia, that PLWA had been discriminated against and ordered damages by way of compensation be paid to the complainant. The Tribunal also made a finding of fact that five councilors in the majority voted against the application on the basis of â€œthe AIDS factorâ€• and one councilor, who abstained from voting, had â€œadvertentlyâ€• encouraged other Councilors to vote against the motion â€œbecause of the AIDS factor.â€• The was then appealed to the Supreme Court of Western Australia, and the High Court of Australia.

Section 66K of the Equal Opportunity Act 1984 (WA) (the Act) relevantly â€œproscribes discrimination on the ground of impairment in the provision of goods and services,â€• while s 66A of the Act provides the circumstances for when unlawful discrimination on the ground of impairment occurs.

Decision and Reasoning

The Court considered three broad sets of issues: whether refusal of planning approval was refusal to provide a â€œserviceâ€• within the meaning of s 66K(1)(a) of the Act, whether IW had standing to bring the claim, and the relationship between the acts of the councilors and the liability of the City of Perth as a corporation. It dismissed the appeal by IW by a vote of 6-1 on the first issue.

With regard to the first issue on the definition of â€œservice,â€• the Court held that the refusal of the Council to give planning approval was not refusal to provide a â€œservice.â€• Brennan CJ and McHugh J held that consideration of an application was not a service, but a power. Their Honors stated that â€œThe Council â€¦ merely had a duty to consider applications and a discretionary power to refuse or approve those applications unconditionally or on conditionsâ€• (191 CLR p. 17).

Dawson and Gaudron JJ, Toohey J, and Gummow J agreed on this point. They considered that while â€œservicesâ€• should be given its ordinary and broad meaning, it would be false to describe the Councilâ€™s disc to give planning approval as a â€œservice.â€• Rather, the discretion was to grant or refuse planning approval, while the service was in considering the application. The service was provided regardless of whether the application was accepted or rejected. Toohey J and Gummow J further pointed out that the applicantâ€™s case was in fact with the manner in which the services were provided. Their Honors considered that s 66K(1)(c), which governed whether services were provided in a discriminatory manner, may have been a more appropriate provision to bring the applicantâ€™s case under.

Kirby J dissented on this point. His Honor considered that the meaning of â€œservicesâ€•, read in its context, included a planning decision by a local government to alter the use of premises. A narrow construction of the term â€œservicesâ€• would frustrate the operation of the Act. In his Honorâ€™s opinion, the refusal to provide plann permission on the basis of unlawful discrimination was exactly what the Act was designed to â€œdiscourage and redress.â€•

On the second issue of standing, a majority of the Court (Brennan CJ and McHugh J, Dawson and Gaudron

JJ, Gummow J) found that IW was not an â€œaggrieved personâ€• within the meaning of the Act. Even if it could be shown that unlawful discrimination had occurred, it had been perpetrated against PLWA, not IW. He therefore did not have standing to bring the matter. Gummow J further added that IW had suffered an impairment, but not sought the relevant services, while PLWA had sought the services, but did not suffer an impairment. This, his Honor pointed out, was a problem in the Act that had since been amended.

Toohey J and Kirby J disagreed on this point. Toohey J pointed out that although the application for approval had been brought by PLWA, there â€œwas never any doubt that [it]â€¦was made on behalf of its members, including the appellant.â€• Likewise, Kirby J considered that â€œthe fact that it was the corporation which actually requested the service is beside the point. The refusal of the service to the corporation was, in effect, necessarily a refusal of a service to its members, including the appellant.â€• To find in the opposite would undermine the purpose of the Act, and the meaning of â€œaggrieved personâ€• should be given â€œample construc so as not to frustrate the stated objective of the Act.

Three of the seven Justices considered the third issue: whether or not the decision of the five councilors refusing planning approval on the basis of â€œthe AIDS factorâ€• could be imputed to the City of Perth. Toohey J, Gummow J, and Kirby J each considered that it could, notwithstanding that the five councillors were not themselves a majority of either the 25-person Council or the 13-vote majority. This was because the City of Perth could act only through its Council and the Councilâ€™s members, and the Cityâ€™s authority was exercised through the actions of each member. Planning approval would have been given but for the five councilors exercising their powers on an impermissible ground. The discrimination of the five councilors therefore tainted the entire bodyâ€™s decision.

Kirby J also considered the potential personal liability of the councilors. However, as the Respondent councilors had not invoked a relevant defense that would have had to be decided on the facts at trial, his Honor considered that the question should be returned to the Tribunal for determination in accordance with the Courtâ€™s interpretation of the relevant legislation.

Overall, the appeal was dismissed.

Decision Excerpts

â€œBut, given the artificial definitions of discrimination in the Act and the restricted scope of their applications, the court or tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute.â€• Brennan CJ and McHugh J, 191 CLR p. 14.

â€œThe appellantâ€™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.â€• Dawson and Gaudron JJ, 191 CLR p. 24.

â€œIt is clear from the structure of the Act generally and, also, from the structure of Pt IVA, that an â€˜aggrieved personâ€™ is a person who is discriminated against in a manner which the Act renders unlawful. And when regard is had to the precise terms of s 66K(l), it is clear that the person discriminated against is the person who is refused services, or who is provided with services on terms or conditions or in a manner that is discriminatory. As already indicated, there was no refusal of services in this case. And if anyone was the recipient of treatment which might constitute discrimination, it was PLWA, not the appellant. Accordingly, the appellant was not an â€˜aggrieved personâ€™ within the meaning of that expression in s 66A(l) of the Act.â€• Daws and Gaudron JJ, 191 CLR p. 25.

â€œWhere, as in this case, the Council, as the executive organ of the City, exercised its powers as responsible authority to refuse the application in circumstances where, but for the ground relevantly animating five of the thirteen majority councillors, the decision would not have been made, s 66K applies. In this regard, the Tribunal, in deciding as it did, did not fall into any error of law.â€• Gummow J, 191 CLR p. 47.