FEDERAL COURT OF AUSTRALIA

Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders that I will make today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be made available on the internet at www.fedcourt.gov.au together with this summary.

This short summary is intended to assist in understanding the issues and the conclusions I have reached in a lengthy judgment. After this summary has been read, I will make my orders and publish my reasons. After that, the judgment and this summary will be made available on the Court's public file to anyone who wishes to read them, in addition to being published on the Court's website.

The applicant, Roxanne Tickle, sued the respondents, Giggle for Girls Pty Ltd (**Giggle**) and Sally Grover, Giggle's Chief Executive Officer and founder, alleging unlawful gender identity discrimination, contrary to s 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**). It is not in dispute that Roxanne Tickle was prevented by the respondents from using a mobile phone social media application, known as the **Giggle App**, marketed for communication between women, which did not allow men to join or use the app. The issue is whether that was unlawful discrimination.

The term *cisgender* refers to a person whose gender corresponds to the sex registered for them at birth. That is to be contrasted with a person whose gender does not correspond with their sex as registered at birth, commonly referred to as *transgender*. The respondents do not accept the legitimacy of the terms cisgender or transgender. I find both terms useful and convenient for the purpose of deciding and discussing the relevant facts, and in accordance with the gender identity discrimination provisions in the SDA.

Roxanne Tickle is a transgender woman, whose female sex is recognised by an official updated Queensland birth certificate. For that reason, I refer to her as Ms Tickle.

The respondents operated the Giggle App during the period from February 2020 until August 2022. Ms Tickle alleges that the respondents' actions in removing her from the Giggle App constituted direct gender identity discrimination, or, in the alterative, indirect gender identity discrimination, as defined in s 5B of the SDA. Both forms of discrimination are unlawful in various contexts under the SDA, including in work, education, the provision of goods, services and facilities, and so on. This case is only concerned with that discrimination in relation to the provision of services via the Giggle App, contrary to s 22 of the SDA.

Direct gender identity discrimination is discrimination *by reason of* a person's gender identity, or a characteristic that appertains to, or is generally imputed to, persons who have that gender identity. Indirect gender identity discrimination is the imposition, or proposed imposition, of a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person relative to another person or persons who have a different gender identity.

Factual findings and conclusions

In about February 2021, Ms Tickle downloaded the Giggle App and registered for an account. That account registration involved supplying a photograph of herself, which was scanned by artificial intelligence software, designed to detect whether a person was male and, if so, refuse them access to the Giggle App. That scan software granted Ms Tickle access to the App.

Later, in about September or early October 2021, Ms Tickle realised that her account had been restricted. I find, largely on evidence provided by Ms Grover, that restriction was likely to have occurred when Ms Grover reviewed Ms Tickle's photograph, considered her to be male, and removed her from the Giggle App.

Ms Tickle then contacted the respondents, stating that her access to the App's features had been restricted. She received an initial email response from Ms Grover, who said that she would look into the issue. Ms Tickle sent follow up emails but received no further email response.

Ms Tickle also attempted to call and text Ms Grover, using the number Ms Grover had supplied in an earlier email. At some point, Ms Grover called Ms Tickle back, but this call was missed. There was no further contact from the respondents. Ms Tickle did not regain access to the Giggle App.

The substance of the respondents' defence is that discrimination did occur, but not prohibited discrimination. They claim that Ms Tickle was discriminated against on the basis of her sex, which they consider to be male, not her gender identity. They consider sex to mean the sex of a person at birth, and that this is unchangeable.

Those arguments failed, because the view propounded by the respondents conflicted with a long history of cases decided by courts going back over 30 years. Those cases establish that, on its ordinary meaning, sex is changeable.

The respondents' views also conflicted with the clear Parliamentary intention to prohibit discrimination on the ground of gender identity in certain contexts, contained in amendments to the SDA that took effect over a decade ago, in 2013.

The respondents also claimed that the Giggle App, as a female-only app, was a special measure to achieve equality between men and women, and was therefore exempt from the prohibitions on discrimination contained in the SDA, by the operation of s 7D. I find that even if the Giggle App could have been considered a special measure to achieve equality between men and women, that would not have allowed the respondents to discriminate on the basis of gender identity, which is distinct from discrimination against women on the basis of sex under the SDA.

The respondents' argument therefore conflicted both with longstanding law as to how sex should be understood in the SDA, and the gender identity provisions of the SDA.

In relation to the direct discrimination claim, the evidence did not establish that Ms Tickle was excluded from the Giggle App by reason of her gender identity, although it remains possible that this was the real but unproven reason. A necessary part of proving that action has been taken by reason of a person's gender identity, and therefore amounts to direct discrimination, is establishing that the alleged discriminator was aware of the person's gender identity. The evidence goes no further than establishing that Ms Tickle's exclusion was likely to have been a byproduct of excluding those who were perceived as being men, by the use of visual criteria that failed to distinguish between cisgender men and transgender women.

The same evidence did, however, support the conclusion that indirect gender identity discrimination did take place. The indirect discrimination case has succeeded because Ms Tickle was excluded from the use of the Giggle App because she did not look sufficiently female, according to the respondents. This finding applies only to the act of excluding

Ms Tickle from the Giggle App. It does not apply to her not being readmitted due to the lack of evidence to explain this, or even to establish that any positive decision was made not to allow her readmission to the Giggle App.

Constitutional questions

I was also required to consider questions going to the constitutional validity of provisions in two statutes, raised by the respondents:

(a) Whether s 22 of the SDA, read with s 5B, was beyond the scope of Commonwealth legislative power, to the extent that it prohibited gender identity discrimination.

(b) Whether s 24 of the *Births, Deaths and Marriages Act 1994* (Qld) was invalid for inconsistency with the SDA under s 109 of the Constitution. This question refers to the provision that made it possible for Ms Tickle to change her registered sex.

As to the first constitutional question, I have found that s 22 is supported by the Commonwealth's external affairs power, as an enactment of Article 26 of the *International Covenant on Civil and Political Rights* (1966). The relevant portion of Article 26 provides that:

> the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

I have decided that "*gender identity*" comes within "*other status*" in Article 26. It follows that s 22 of the SDA, read with s 5B, is valid in its application to Ms Tickle's case. The same result is reached in this case by finding those provisions are also an exercise of the Commonwealth's corporations power. That is because I find Giggle to be a trading corporation, and Ms Grover its officer.

However, I was not satisfied that the kind of gender identity discrimination alleged by Ms Tickle under s 22 would be supported as an enactment of the *Convention for the Elimination of All Forms of Discrimination Against Women* (1979) (**CEDAW**). The respondents contended that this was because CEDAW grants protections only to women, and the word "*women*" in CEDAW only means adults who were female sex at birth. I do not need to decide whether that is correct or not, because the way in which the term "*discrimination against women*" is defined in CEDAW means it refers only to discrimination that places women in a less favourable position than men. It therefore does not cover the kind of

discrimination that Ms Tickle alleges in this case, which is discrimination that placed her in the *same* position as men.

It is well established that questions of constitutional validity should ordinarily only be determined if they properly arise on the case that has been brought: *LibertyWorks Inc v Commonwealth* [2021] HCA 90; 274 CLR 1 at [90]. Accordingly, it was not necessary to decide whether the term "*women*" in CEDAW includes transgender women.

As to the second constitutional question, I have found that there was no inconsistency between the *Births, Deaths and Marriages Act 1994* (Qld) and the SDA. The two statutes can and do operate harmoniously.

It follows that both of the respondents' constitutional challenges failed.

Conclusion

I have found that Ms Tickle's claim of direct gender identity discrimination fails, but that her claim of indirect gender identity discrimination succeeds.

I will make a declaration of contravention by way of unlawful indirect gender identity discrimination against the respondents, subject to input from the parties as to the form of that declaration. I will also order the respondents to pay Ms Tickle compensation in the sum of $10,000 and to pay her costs, with a cap in respect of costs to do with the constitutional validity and statutory construction issues.

JUSTICE BROMWICH

23 August 2024