VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST VCAT REFERENCE NO. H352/2017

CATCHWORDS

Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* – application for proceeding to be struck out or dismissed; section 122-124 *Equal Opportunity Act 2010* – who can apply to VCAT for an order; representative body and sufficient interest; consent of child or parent.

APPLICANT	Secular Party of Australia Inc.
RESPONDENT	The Department of Education and Training
WHERE HELD	Melbourne
BEFORE	Senior Member B. Hoysted
HEARING TYPE	Strike-Out Hearing
DATE OF HEARING	20 June 2018
DATE OF ORDER AND WRITTEN REASONS	27 August 2018
CITATION	Secular Party of Australia Inc. v the Department of Education and Training (Human Rights) [2018] VCAT 1321

ORDER

The application is summarily dismissed under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*.

B. Hoysted
Senior Member

APPEARANCES:

For the applicant:	Mr J. Perkins, representative
For the respondent:	Ms E. Golshtein of counsel

REASONS

BACKGROUND

1 By application filed with the Tribunal in December 2017, John Perkins claimed that a named State run primary school, by permitting primary school girls to wear religious dress, was discriminating against those female students by imposing on them a religious belief which was detrimental to them and which they were too young to decide upon themselves.

2 By order of the Tribunal dated 27 February 2018, the Tribunal directed that the Tribunal's register be corrected to show that the applicant was the Secular Party of Australia Inc (**the Secular Party**) and the proper respondent was the Department of Education and Training (**the Department**).

3 The application alleged discrimination against the child by denying her access to a benefit or subjecting her to a detriment relying on section 38 of the *Equal Opportunity Act 2010* (**the EO Act**). Further, the applicant noted the exception allowed for in section 42 of the EO Act but claimed a detrimental dress code could not come within that exception.

4 The Secular Party of Australia Inc. claimed that it was entitled to bring the application on behalf of the child because it had, as an objective, "the defence of human rights against the unjustified imposition of religion"[1] and was a "representative body" as per section 124 of the EO Act.

5 By application dated 3 April 2018, the Department applied to the Victorian Civil and Administrative Tribunal (**VCAT**) for summary dismissal of the application pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the VCAT Act**).

6 The strike-out application was heard by me on 20 June 2018 at the conclusion of which, I reserved my decision and reasons for same.

SUMMARY OF CLAIM BY THE SECULAR PARTY

7 Mr Perkins, President of the Secular Party, claimed that in January and February 2017, in very hot weather, he observed a child at a school run by the Department, wearing "religious style clothing that covered her body, leaving only her face and hands exposed".[2]

8 Mr Perkins subsequently wrote to the school principal and expressed his concern that the dress style was detrimental to the child.

9 In November 2017, Mr Perkins wrote again to the school principal expressing his view that the approval of such clothing constituted discrimination against the child on the basis of religion in contravention of the EO Act.

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[1] Paragraph 15 of the applicant's particulars of claim dated 13 March 2018.
[2] Paragraph 2 of the particulars of claim.

10 According to the applicant, the child was too young to genuinely hold a religious belief and the choice of clothing was that of the child's parent. Even if the child did have a genuine religious belief, the applicant asserted that the imposition of detrimental clothing was still discriminatory.

11 In addition to the alleged breaches of section 38(2) and section 42 of the EO Act, the applicant also alleged that the Department breached the child's rights under the Charter of Human Rights and Responsibilities.[3]

12 The applicant asserted that it was a representative body[4] and brought the application in that capacity claiming it had sufficient interest in the matter because it has, as an objective, the defence of human rights against the unjustified imposition of religion.

13 It also claimed that it was not reasonable to expect that the child would give consent (to the application) as to do so would contravene the wishes of the parent who had instigated the discrimination. The applicant submitted that the Tribunal should find consent had been given to bring the application[5] "in the sense of implied or default consent"[6]. The applicant sought to rely on witnesses who would say that, in some cases, such a girl is not willing to dress in that way and may need be persuaded, if not coerced, by the parents.

14 The applicant acknowledged that neither the child nor her parents had been approached about the application or to provide consent to it.

15 If there was any doubt about the consent issue, the applicant asserted that sections 17 and 32 of the Charter of Human Rights and Responsibilities (**the Charter**) would satisfy the Tribunal that the applicant could make this application.

SUMMARY OF THE DEPARTMENT'S APPLICATION FOR SUMMARY DISMISSAL

16 The Department submitted that the applicant was not a person entitled to invoke the Tribunal's jurisdiction.[7]

17 Counsel for the Department noted that the Tribunal has no inherent jurisdiction and its jurisdiction "derives entirely from statute".[8]

18 The EO Act is an enabling enactment for the purposes of the VCAT Act.

19 Section 43 of the VCAT Act provides that:

> The original jurisdiction of the Tribunal is invoked-
>
> (a) by a person who is entitled by or under an enabling enactment to do so applying to the Tribunal in accordance with section 67.

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[3] Section 14(1)(a) and 14(2) and 17(2) *Charter of Human Rights and Responsibilities Act 2006.*
[4] Section 124(1)(a) of the EO Act.
[5] Section 124 of the EO Act.
[6] Paragraph 15 particulars of claim.
[7] Section 122-124 EO Act.
[8] *Director of Housing v Sudi* [2011] VSCA 266 at paragraph 19 per Warren CJ.

20 The Department noted that the Secular Party did not seek to rely upon section 123 of the EO Act but sought to invoke the concept of consent as provided for in section 124, which provided for an application to made on behalf of others by a representative body.

21 The Department submitted the Secular Party had not satisfied the preconditions necessary in order for it to bring an application on behalf of the child in that it had neither the consent of the child (or her parents) nor "sufficient interest" in the application.

22 According to counsel for the Department, the Charter would only be relevant if the Tribunal had jurisdiction to hear the application or where there was any doubt about the interpretation of the EO Act. The Department submitted that the language of section 123 and 124 of the EO Act was clear and unequivocal and that Parliament had intended sections 123 and 124 to apply where a person had given express rather that implied consent.

23 The Department submitted that the application invited the Tribunal to-

> accept an entirely novel construction of consent without authority and without any evidentiary basis…other than the assertion that children are too young to understand religion, so one must assume they did not have the necessary belief and if given a choice, would make a different choice.[9]

24 The Department submitted that the application by the Secular Party was frivolous, vexatious and an abuse of process and ought to be struck out by the Tribunal for want of jurisdiction to hear the matter.

THE STRIKE-OUT APPLICATION – RELEVANT LAW

25 Section 75(1) of the VCAT Act provides that at any time VCAT can make an order summarily dismissing or striking out all, or any part of a proceeding, that in its opinion is frivolous, vexatious, misconceived or lacking in substances or is otherwise an abuse of process.

26 The relevant principles governing section 75 are well established[10] and can be summarised as follows:

a It is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.

b The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complainant can be said to disclose no

[9] Paragraph 35 of the Department's strike-out application.
[10] *State Electricity Commission v Raybel* [1998] 1 VR 102.

reasonable cause of action, or where a respondent can show a defence sufficient to warrant the summary termination of the proceeding.

c On an application to terminate a complaint summarily, the Tribunal must clearly distinguish between the complaint itself and the evidence which is to be given in evidence in support of it. A complaint cannot be struck out as lacking in substance because it does not itself contain the evidence which supports the claim it makes.

d The Tribunal should not apply technical, artificial or mechanical rules in construing a complaint or coming to a view about the case a complainant wishes to advance.

e The respondent carries the onus of satisfying the Tribunal that the complaint is obviously hopeless, obviously unsustainable or on no reasonable view can justify relief or is bound to fail.[11]

THE APPLICANT'S CASE

27 The Secular Party relied upon the following documents:

a the application filed with the Tribunal on 19 December 2017;

b particulars of claim dated 13 March 2018;

c submission dated 11 June 2018 in opposition to the respondent's strike-out application; and

d five witness statements filed in accordance with the order of the Tribunal dated 27 February 2018.

THE RESPONDENT'S CASE

28 The Department relied upon the following document:

a Respondent's outline of strike-out submissions prepared by Phoebe Knowles, Barrister dated 3 April 2018.

THE APPLICANT'S RESPONSE TO THE RESPONDENT'S STRIKE-OUT APPLICATION

Consent

29 The applicant submitted that in the circumstances of this matter where the child's clothing was decided by the parents, not the child, based on the religious beliefs of the parents, not the child, where the heat was excessive, where other children were wearing light, comfortable clothing and where the child in question was wearing an additional layer of clothing, that it would not be reasonable to assume the child would consent to wearing such clothing.

[11] *Norman v Australian Red Cross Society* [1998] 14 VAR 243.

30 The applicant noted that the EO Act provided for a situation where the child consented to an application on its behalf, but the parents did not.[12]

31 It was open to the Tribunal to decide from the circumstances, whether the child may reasonably be expected to have consented to the application by the Secular Party.

32 The applicant submitted that where the child would reasonably be expected to oppose the wearing of the clothing in hotter weather that it would be reasonable to expect that the child would consent to the application being brought on its behalf.

33 The applicant claimed that the treatment of the child in this matter was "inhumane" and given it had been instigated by the parents and condoned by the school, the parents' rights were forfeit.[13]

34 Mr Perkins for the applicant submitted that if the Tribunal was in any doubt about the assumption that the child would consent, then the Tribunal should consider the testimony of the five witnesses for the applicant who would state that if they had been given a choice about the "religious strictures imposed on them" they would have preferred to have a choice and would have consented to the applicant's application.

35 Mr Perkins made submissions at hearing about the intentions of the Parliament in relation to the EO Act. Relying on section 38(1) and (2), he submitted that that the Tribunal should conclude that it was the firm intention of the Parliament to protect the interests of a child in a school.

36 Noting that the EO Act does not require the Tribunal "must ensure" that "explicit" consent of a child be given, Mr Perkins invited the Tribunal to agree with his view that the Parliament had intended to grant the Tribunal to right to be satisfied in the sense of implied or default consent.

Sufficient interest

37 The applicant submitted that the Secular Party had a special interest in this matter which allowed it to act as a representative body. Mr Perkins for the applicant submitted that the interest was not just an intellectual or emotional concern but was consistent with the aims and objectives and policies of the Secular Party.

38 The respondent submitted that it was in accordance with the objectives of the Secular Party to bring the application as a representative body as provided for in section 124(2) of the EO Act.

39 In his submission to the Tribunal, Mr Perkins for the Secular Party stated that the prime motivation for the formation of the Secular Party was to oppose the indoctrination of children in schools. Mr Perkins stated that the

[12] Section 123(1)(c)(i) EO Act.
[13] Citizen Child: Australian law and children's rights, chapter 2, Reflections on Children's Rights.

welfare and rights of the child concerned was of genuine concern to the Secular Party.

The Charter

40 The applicant submitted that because there was doubt about what the Tribunal required in order to be satisfied that appropriate consent was addressed, then the Tribunal should also consider sections 32, 17(2) of the Charter.

41 Section 32 of the Charter provides that:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

42 Section 17(2) of the Charter provides that:

> Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

43 Section 14(2) of the Charter provides that:

> A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Other submissions

44 The applicant submitted that the Tribunal could exercise the *parens patriae* convention in considering whether the child had or should be required to provide consent to the application being brought on its behalf by the Secular Party.

45 In arguing that the Tribunal had jurisdiction to hear and determine its application, the applicant also sought to rely on the Universal Declaration on Human Rights[14], the International Covenant on Civil and Political Rights[15] and the UN Convention on the Rights of the Child 1989[16].

THE RESPONDENT'S SUBMISSIONS

Consent

46 The respondent submitted that in order to rely on section 123((1)(c)(iii) or section 124 of the EO Act, the Secular Party would need to be able to show that the child or her parents had provided consent to the Secular Party bringing the application on her behalf. The respondent argued that consent should be explicit and clearly established by evidence and that the submissions by the Secular Party about implied consent should be dismissed by the Tribunal.

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[14] Article 18.
[15] Article 18.
[16] Articles 14 and 19.

47 In its written submission, the respondent claimed that the Secular Party had invited the Tribunal to "play with the words"[17] of the EO Act in a way that the Tribunal was not permitted to do. The respondent contended that the applicant had "invited the Tribunal to accept an entirely novel construction of consent without authority and without any evidentiary basis for the submission, other than the assertion that children are too young to understand religion, so one must assume they do not have the necessary belief and, if given a choice, would make a different choice".[18]

Sufficient interest

48 The respondent submitted that the Secular Party had failed to establish that it had a sufficient interest in this proceeding in order for it to have standing. The respondent cited the following as relevant principles[19] which should guide and bind the Tribunal in deciding the issue of whether the Secular Party, as an organisation, should have standing to bring the substantive application in this matter:

a An organisation needed to demonstrate a "special interest" in the subject matter. A "mere intellectual or emotional concern" was not enough. The interest must go beyond that of members of the public in upholding the law and must involve more than genuinely held convictions.

b The fact that a person makes comments on and participates in public consultations on the issue does not of itself confer standing on that person to challenge or complain of a decision resulting from that process.

c That an organisation did not demonstrate a special interest sufficient to establish standing by formulating objects that demonstrate an interest in and commitment to a particular topic.

49 The interests of the Secular Party in this matter were, according to the respondent, akin to an intellectual concern and not sufficient for it to be seen as a representative body entitled to bring an application on behalf of another person.

The Charter

50 Counsel for the Department submitted that the submissions made by the applicant were inconsistent with the plain language of sections 123 and 124 of the EO Act and section 43 of the VCAT Act which were clear and unambiguous and accordingly did not justify the application of the Charter.

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[17] *ZD v Secretary to the Department of Health and Human Services* (unreported, VSC, 22 December 2017, Osborne, JA) [2017] VSC 806 at paragraph 35.

[18] Paragraph 35 of the respondent's outline of strike-out submissions.

[19] (1994) 55 FCR 492; [1994] FCA 1556, in which his Honour reviewed the decisions of the High Court of Australia in *Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 and *Onus v Alcoa Australia Limited* (1981) 149 CLR 27 and cited with approval in *EEG v VicForrests* [2009] VSC 386 (**EEG**) at [64].

51 The Department was not moved by the applicant's submissions on the application of the Charter, to make other specific submissions than it had made about the issues of standing, consent and whether the applicant had sufficient interest to be a representative applicant.

Other submissions

52 Counsel for the respondent also drew VCAT's attention to the 1989 UN Convention on the Rights of the Child and the comments of the Child Rights International Network about the application of article 14(2).

DISCUSSION AND CONCLUSIONS

53 The application pursuant to section 75 was not made on the basis that the application was frivolous or vexatious but on the basis that the Secular Party was not entitled to invoke the VCAT's jurisdiction: sections 122 – 124 of the EO Act.

54 It was not disputed by the parties that VCAT has no inherent jurisdiction; that the EO Act is an enabling enactment for the purposes of the VCAT Act; that in determining an application under the EO Act, VCAT is exercising its original jurisdiction pursuant to section 43 of the VCAT Act. The parties also agreed that in order to invoke the VCAT's original jurisdiction an application could be made by a person "entitled by or under an enabling enactment to do so applying to the Tribunal".[20]

55 It was not in dispute that the child or her parents would be able to bring an application to the Tribunal.

56 What was in dispute was whether the Secular Party could bring the application on behalf of the child. To do so, the Secular Party would need to rely on either section 123(1)(c)(iii) or section 124 of the EO Act and to do that the Secular Party had to establish that the child or her parents had consented to the application.

57 It was not disputed between the parties that the child at the centre of the application and her parent(s) were not informed of the application by the Secular Party and were not otherwise aware of its existence.

58 In order for the VCAT to have jurisdiction to hear the application, I would need to be persuaded by the applicant's arguments that the Tribunal should be satisfied that the Secular Party could bring this application on behalf of the child because the consent of the child or her parent could be implied or inferred.

59 I was not persuaded that such consent could be implied or inferred as suggested by the applicant. The applicant's argument was founded on a belief that the child was suffering a detriment and would reasonably be expected to consent. Even taken at its highest, I could not be satisfied that there was a basis for such a belief.

[20] Section 43 of the VCAT Act.

60 The applicant had filed statements from five women who attested that as children they had been required to wear restrictive clothing for religious beliefs heled by their parents. Each witness said that given the choice, she would not have worn the religious clothing. The applicant submitted that these witnesses should persuade the VCAT to accept that consent could be and was, in this case, to be implied. I formed the view that the evidence of these five witnesses, taken at its highest, would do nothing to persuade VCAT that consent by the child or parent could be other than express consent. What was relevant was not the experiences of five women but whether the child at the centre of this matter, or her parents, had provided the necessary consent.

61 Given that I was not satisfied that the consent of the child or the parent had been given or could be inferred to the satisfaction of the Tribunal, then it is strictly unnecessary for me to consider whether the Secular Party has sufficient interest in the application to satisfy section 124 of the EO Act.

62 While I accept that section 32 of the Charter provides that all statutory provisions must be interpreted in a way that is compatible with human rights, the applicant's arguments about the Charter did not satisfy me that the VCAT had jurisdiction to hear the application of the Secular Party.

63 The arguments put by the applicant that the Tribunal could exercise the *parens patriae* convention or that the rights of the parents were forfeit or the submissions made about the Conventions and the Charter were not sufficient to overcome the fatal flaw in the application which was that the Secular Party lacked the necessary consent to bring the application and so the Tribunal lacked the jurisdiction to hear its application. The application was misconceived and is summarily dismissed.

B. Hoysted
Senior Member

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