FEDERAL COURT OF AUSTRALIA

Eatock v Bolt [2011] FCA 1103

SUMMARY

BROMBERG J
28 SEPTEMBER 2011
MELBOURNE

SUMMARY

1 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 publication of the Court's reasons for judgment. 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 available on the internet at http://www.fedcourt.gov.au/ together with this summary.

2 Ms Eatock has brought this proceeding on her own behalf and on behalf of people like her who have a fairer, rather than darker skin, and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons. I will refer to this group of people as "fair-skinned Aboriginal people".

3 Ms Eatock complains about two newspaper articles written by Mr Andrew Bolt and published by the Second Respondent ("the Herald & Weekly Times") in the *Herald Sun* newspaper and on that paper's online site. She also complains about two blog articles written by Mr Bolt and published by the Herald &Weekly Times on the *Herald Sun* website.

4 Broadly speaking, the nature of her complaint is that the articles conveyed offensive messages about fair-skinned Aboriginal people, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people. Ms Eatock wants the law to address this conduct. She wants declarations and injunctions and an apology from the Herald & Weekly Times. She calls in aid Part IIA of the Racial Discrimination Act 1975 (Cth) ("the Racial Discrimination Act") which includes sections 18C and 18D. She claims that by their conduct, Mr Bolt and the Herald & Weekly Times have contravened section 18C of the Racial Discrimination Act.

5 In order to succeed in her claim, Ms Eatock needed to establish that:

- It was reasonably likely that fair-skinned Aboriginal people (or some of them) were offended, insulted, humiliated or intimidated by the conduct; and
- That the conduct was done by Mr Bolt and the Herald &Weekly Times, including because of the race, colour or ethnic origin of fair-skinned Aboriginal people.

6 Mr Bolt and the Herald &Weekly Times dispute that the messages that Ms Eatock claims were conveyed by the articles, were in fact conveyed. They deny that any offence was reasonably likely to be caused and also that race, colour or ethnic origin had anything to do with Mr Bolt writing the articles or the Herald & Weekly Times publishing them. They also say that - if Ms Eatock should establish those elements which she needs to satisfy the Court about - their conduct should not be rendered unlawful, because it should be exempted or excused. For that purpose, they rely on section 18D of the Racial Discrimination Act.

7 Section 18D exempts from being unlawful, conduct which has been done reasonably and in good faith for particular specified purposes, including the making of a fair comment in a newspaper. It is a provision which, broadly speaking, seeks to balance the objectives of section 18C with the need to protect justifiable freedom of expression.

8 All of that raises interesting, difficult and important questions which needed to be resolved in order for Ms Eatock's claim to be determined.

9 The newspaper articles the subject of Ms Eatock's claim, describe what in this case has been referred to as a 'trend'. The 'trend' and the people who constitute it are the subject of criticism by Mr Bolt. Each article refers to a number of named individuals who are said to have chosen to identify as Aboriginal, as examples of the people in the wider 'trend'.

10 Collectively, eighteen individuals are named in the articles. Nine of those individuals gave evidence in this case. Each of them genuinely identifies as an Aboriginal person and has done so since their childhood. Each was raised to identify as an Aboriginal person and was enculturated as an Aboriginal person. None of them 'chose' to be Aboriginal. Nor have they used their Aboriginal identity inappropriately to advance their careers. Each is entitled to regard themselves and be regarded by

others as an Aboriginal person within the conventional understanding of that description.

11 Part IIA was inserted into the Racial Discrimination Act in 1995. A number of issues were raised in the case about what the provisions of Part IIA mean and how those provisions should be applied.

12 Mr Bolt and the Herald & Weekly Times relied upon the heading of Part IIA to contend that the operation of Part IIA is restricted to racist behaviour based upon racial hatred. I disagree. The legislative history of Part IIA and the words utilised in Part IIA show that contention to be incorrect. No decision of this Court has interpreted Part IIA to be limited to the incitement of racial hatred.

13 Part IIA has a broader field of operation. Infused by the values of human dignity and equality, the objectives of Part IIA extend to promoting racial tolerance and protecting against the dissemination of racial prejudice.

14 Part IIA is also concerned to protect the fundamental right of freedom of expression. Freedom of expression is an essential component of a tolerant and pluralistic democracy. Section 18D of the Racial Discrimination Act exempts from being unlawful, offensive conduct based on race, where that conduct meets the requirements of section 18D and may therefore be regarded as a justifiable exercise of freedom of expression. In that way, Part IIA seeks to find a balance between freedom of expression and freedom from racial prejudice and intolerance based on race.

15 Whether conduct is reasonably likely to offend, insult, humiliate or intimidate a group of people calls for an objective assessment of the likely reaction of those people. I have concluded that the assessment is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people. General community standards are relevant but only to an extent. Tolerance of the views of others may be expected in a multicultural society, including from those persons who are the subject of racially based conduct.

16 I have concluded that from the perspective of fair-skinned Aboriginal people, the messages (or what lawyers call "the imputations") conveyed by the newspaper articles which Mr Bolt wrote, included that:

- There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

- Fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

17 I am satisfied that fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the newspaper articles.

18 A causal nexus is required to be demonstrated between the act reasonably likely to offend and the racial or other characteristics or attributes of the persons reasonably likely to have been offended. A test for that causal nexus has been expressed in different ways including whether the act was "plainly calculated to convey a message about" the racial group?

19 I have concluded that, for the purpose of section 18C of the Racial Discrimination Act, Aboriginal people are a race and have common ethnic origin.

20 The imputations which I have found were conveyed by the newspaper articles were plainly calculated to convey a message about the race, ethnicity or colour of fair-skinned Aboriginal people, including whether those people are sufficiently of Aboriginal race, colour or ethnicity to be identifying as Aboriginal. I am satisfied that Mr Bolt both understood and intended that imputations of that kind were conveyed by the newspaper articles he wrote. I have therefore found that in writing those parts of the newspaper articles which conveyed the imputations, Mr Bolt did so including because of the race, ethnic origin or colour of fair-skinned Aboriginal people.

21 I am also satisfied that the causal nexus has been established in relation to the publication of the newspaper articles by the Herald & Weekly Times.

22 In reaching those conclusions, I have observed that in seeking to promote tolerance and protect against intolerance in a multicultural society, the Racial Discrimination Act must be taken to include in its objectives tolerance for and

acceptance of racial and ethnic diversity. At the core of multiculturalism is the idea that people may identify with and express their racial or ethnic heritage free from pressure not to do so. People should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying. Disparagement directed at the legitimacy of the racial identification of a group of people is likely to be destructive of racial tolerance, just as disparagement directed at the real or imagined practices or traits of those people is also destructive of racial tolerance.

23 I have not been satisfied that the offensive conduct that I have found occurred, is exempted from unlawfulness by section 18D. The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained errors of fact, distortions of the truth and inflammatory and provocative language.

24 In coming to that view, I have taken into account the possible degree of harm that I regard the conduct involved may have caused. Beyond the hurt and insult involved, I have also found that the conduct was reasonably likely to have an intimidatory effect on some fair-skinned Aboriginal people and in particular young Aboriginal persons or others with vulnerability in relation to their identity.

25 I have taken into account that the articles may have been read by some people susceptible to racial stereotyping and the formation of racially prejudicial views and that, as a result, racially prejudiced views have been reinforced, encouraged or emboldened. In the balancing process, I have also taken into account the silencing consequences upon freedom of expression involved in the Court making a finding of contravention.

26 I have concluded that the conduct of Mr Bolt and the Herald & Weekly Times is not exempted by section 18D of the Racial Discrimination Act from being unlawful because:

(i) it was not done reasonably and in good faith in the making or publishing of a fair comment, within the requirements of section 18D(c)(ii) of the Racial Discrimination Act; or

(ii) done reasonably and in good faith in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest, within the requirements of section 18D(b) of the Racial Discrimination Act.

27 On the basis of my findings, I am satisfied that each of Mr Bolt and the Herald & Weekly Times engaged in conduct which contravened section 18C of the Racial Discrimination Act.

28 I have made no findings of contravention in relation to the two blog articles. Those articles were relied upon for additional claims which were raised by Ms Eatock very late in the trial of the proceeding. It would have been procedurally unfair to Mr Bolt and the Herald &Weekly Times to have permitted Ms Eatock to pursue those additional claims.

29 As to the relief which should be granted by the Court, I intend to direct the parties to confer with a view to agreeing on orders to give affect to the Court's reasons for judgment. I have indicated that the Court will make a declaration that Mr Bolt and the Herald &Weekly Times have contravened section 18C of the Racial Discrimination Act. I have also indicated that I will make orders prohibiting the republication of the newspaper articles. In the absence of the publication of an apology, I will consider making an order for the publication in the *Herald Sun* of a corrective notice.

30 Finally, in dealing with the formulation of the orders to be made by the Court, I have observed that it is important that nothing in the orders I make should suggest that it is unlawful for a publication to deal with racial identification, including by challenging the genuineness of the identification of a group of people. I have not found Mr Bolt and the Herald & Weekly Times to have contravened section 18C, simply because the newspaper articles dealt with subject matter of that kind. I have found a contravention of the Racial Discrimination Act because of the manner in which that subject matter was dealt with.