

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

JOHNSTON v AINSLIE FOOTBALL CLUB LTD (Discrimination) [2018] ACAT 104

DT 3/2018

Catchwords: **DISCRIMINATION** – disability – evidence of loss of function – insufficient evidence of associated behaviours – exclusion from gambling section of a club – whether the respondent directly or indirectly discriminated against the applicant in issuing an invalid mandatory exclusion notice – whether the respondent victimised the applicant – no discrimination or victimisation

Legislation cited: *Discrimination Act 1991* ss 5AA, 7, 8, 20, 22, 30, 68
Evidence Act 2011 s 140
Gaming Machine Act 2004
Human Rights Commission Act 2005 ss 53A, 53CA
Liquor Act 2010

Subordinate

Legislation cited: *Gambling and Racing Control (Code of Practice) Regulation 2002* ss 6A

Cases cited: *Briginshaw v Briginshaw* (1938) 60 CLR 336
Ezekiel-Hart v Reis and Anor [2017] ACAT 3
Kovac v The Australian Croatian Club Ltd [2014] ACAT 41
Purvis v NSW (Department of Education and Training) (2003) 217 CLR 92
State of NSW (NSW Police Force) v Whitfield (EOD) [2012] NSWADTAP 27

Tribunal: Senior Member L Beacroft

Date of Orders: 26 October 2018

Date of Reasons for Decision: 26 October 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) DT 3/2018

BETWEEN:

TODD JOHNSTON
Applicant

AND:

AINSLIE FOOTBALL AND SOCIAL CLUB LTD
Respondent

TRIBUNAL: Senior Member L Beacroft

DATE: 26 October 2018

ORDER

The Tribunal orders that:

1. The application is dismissed.
2. An order on cost is reserved. The parties are at liberty to make written submissions on costs by COB 30 November 2018, and the Tribunal will make a costs order based on any written submissions.

.....
Senior Member L Beacroft

REASONS FOR DECISION

1. At the time relevant to this matter the respondent, Ainslie Football and Social Club Ltd (**AF and SC**), owned and operated the Ainslie Football and Social Club and the Gungahlin Lakes Golf and Community Club¹ (**the Club**). This remained the case at the date of the hearing. At the relevant times, the two venues operated by the respondent were licensed under the *Gaming Machine Act 2004* and the *Liquor Act 2010*, with the respondent being the licensee. As the licensee the respondent was required to comply with various requirements, most relevantly here the *Gambling and Racing Control (Code of Practice) Regulation 2002* (**GRCA Regulation**) including its Code at Schedule 1 (**the Code**).
2. Todd Johnston was a member at the respondent's venues from 7 December 2006, as a social member and also a golfing member. At times relevant to this matter Mr Johnston worked as a contractor who stocked vending machines at the venues.
3. On 17 May 2013, Ms B Edwards an employee of the Club issued Mr Johnston with a Mandatory Exclusion Notice (**the Notice**),² under clause 1.14 of the Code: "the licensee of a gambling facility must exclude a person from gambling at the facility if the licensee has reasonable grounds for believing that the welfare of the person, or any of the person's dependants, is seriously at risk because of the person's gambling problem." The applicant made a discrimination complaint to the Human Rights Commission (**HRC**) dated 13 September 2017 against the respondent. The HRC referred the complaint to the ACT Civil and Administrative Tribunal (**the Tribunal**) in a letter dated 12 February 2018.³ The latter referral letter set out the complaint as being discrimination on the basis of disability in access to premises and membership of a club, and victimisation. The applicant claimed damages of \$506,000, claiming for economic and non-economic loss.⁴
4. The Tribunal dismisses Mr Johnston's application for the reasons set out below.

¹ Respondent's submission dated 18 May 2018 at [9]-[11]

² Applicant's submission to HRC [attachments 1A and 1B]; Patterson statement [attachments SP20 and SP21]

³ Referral under section 53A *Human Rights Commission Act 2005*

⁴ Applicant's submission dated 16 April 2018, page 44

Issues and summary of relevant law

5. The Tribunal had to decide about the following issues: Did the respondent directly or indirectly discriminate against the applicant in issuing the Notice, and further did the respondent victimise the applicant (refer to sections 8, 68 of the *Discrimination Act 1991* (**D Act**)).
6. Discrimination can be direct, indirect or both.⁵ The applicant claimed that the action of the respondent in issuing him with an exclusion notice discriminated against him both directly and indirectly. A person **directly** discriminates against someone else “if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes”.⁶ The applicant alleged he had a disability: acquired brain injury, post-traumatic stress disorder (**PTSD**) and anxiety.⁷ A disability includes “loss of a bodily or mental function”, and also behaviour that is a “symptom or manifestation of the disability”.⁸ A person **indirectly** discriminates against someone else “if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes”.⁹ These prohibitions on discrimination apply to the terms of membership of a Club, and the provision of goods, services or facilities.¹⁰ There are various defences, the most relevant to these proceedings being that the D Act “does not make unlawful anything done necessarily for the purpose of complying with a requirement of a Territory law” (acts done under statutory authority).¹¹
7. The applicant also claimed he was victimised. Victimisation is prohibited: it is unlawful for a person “to subject, or threaten to subject, another person to any detriment because the other person” has or proposes to take discrimination action or they believe that they will. Taking discrimination action includes “making a

⁵ *Discrimination Act 1991* section 8(1)

⁶ *Discrimination Act 1991* section 8(2)

⁷ Applicant’s submission to the HRC, attached to the applicant’s submission dated 16 April 2018

⁸ *Discrimination Act 1991* section 5AA(1)(a), (2)(a)

⁹ *Discrimination Act 1991* section 8(3)

¹⁰ *Discrimination Act 1991* sections 20, 22

¹¹ *Discrimination Act 1991* section 30(1)(a)

discrimination complaint” to the HRC and “reasonably assert any rights” that the person has under this Act [D Act].”¹²

8. When considering the cause of any unfavourable treatment, Professor Spender sets out the test for causation in the case of *Kovac v The Australian Croatian Club Ltd* [2014] ACAT 41 (**Kovac**) as follows:

whether the applicant’s [protected attribute] is, either alone or in combination with other reasons, a real, genuine and not insubstantial reason for the unfavourable treatment....so in determining whether the respondent [in that case] has treated the applicant unfavourably... the Tribunal will take into account all reasons for doing the act other than those that are not real or genuine or insubstantial.

9. In regard to the applicant’s alleged discrimination, the applicant has the onus of proof. Section 140 of the *Evidence Act 2011* applied, so the applicant had to meet the civil proceedings standard of proof, being proof on the balance of probabilities. Section 53CA of the *Human Rights Commission Act 2005* (**HRC Act**) provides that “it is a rebuttable presumption that discrimination has occurred” if the complainant establishes that the “treatment ...is unfavourable” and the complainant presents evidence that “the treatment ...is because of a protected attribute” in the absence of any other explanation.¹³ However the respondent argued that this did not apply in this case since it was inserted into the HRC Act and took effect from 8 June 2016, without retrospective effect.¹⁴ As set out by Professor Spender in the *Kovac* case,¹⁵ there is a question of whether the *Briginshaw*¹⁶ principle, which concerns the weightiness of the evidence required to meet this standard, applies in a case. In the *Kovac* case the *Briginshaw* principle did not apply because his claim did not involve allegations of fraud or a lack of probity. During the hearing the Tribunal found similarly, for similar reasons, that the *Briginshaw* principle did not apply in this case.¹⁷

¹² *Discrimination Act 1991* section 68(b) and (g)

¹³ HRC Act section 53CA(2)(a) and (b)

¹⁴ Respondent’s closing submission, 27 July 2018 at [22]-[23]

¹⁵ *Kovac v The Australian Croatian Club Ltd* [2014] ACAT 41 at [90]

¹⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336

¹⁷ Transcript of proceedings, 5 June 2018, page 26

History of proceedings

10. Before the applicant's matter was referred to the Tribunal by the HRC, on 15 December 2015, the applicant applied to the ACT Gambling and Racing Commission (**the G and R Commission**) for a review of the Notice. The G and R Commission revoked the Notice on 4 May 2016, stating:

The Commission found that the licensee had, and should be commended on, recording several entries in relation to Mr Johnston's possible problem gambling indicators in the licensee's problem gambling incident register. However, section 1.15 of the Code provides that a licensee must have regard to whether the exclusion is necessary to protect the welfare of the person, or their dependents, from any risk in relation to the person's gambling and it is in the public interest.

The incidents recorded by the licensee identified that the licensee may have reasonable grounds to believe Mr Johnston had a gambling problem, however there did not seem to be enough evidence to suggest, within reasonable circumstances, that Mr Johnston needed to be excluded from gambling to protect his welfare, or his dependents, from risk in relation to the person's gambling problem.

One specific incident, recorded on 10 May 2013, states "exclude Todd he is a persistent nuisance and keeps attempting to cause problems". This statement appears to indicate that the licensee was excluding Mr Johnston for behavioural issues rather than due to a need to protect Mr Johnston's welfare in relation to a gambling problem. It is noted that the licensee has other means under its constitution if it wishes to prohibit patrons from using its facilities for behavioural issues.¹⁸

11. Upon the referral to the Tribunal of the applicant's complaint, the Tribunal conducted directions hearings. Prior to the hearing the parties filed and exchanged submissions, witness statements and documentation relevant to the case. The applicant subpoenaed his medical records at various medical establishments. A hearing was conducted on 5 and 6 June 2017. The applicant was self-represented, gave oral evidence, and he was supported at the hearing by his mother Ms M Bellhouse. The respondent was represented by Ms P Thew, Counsel, instructed by Ms E Newman, Clyde and Co. Simon Patterson, CEO of the respondent, gave oral evidence. During the hearing various material submitted by each party was accepted into evidence as exhibits, including an audio of part of a conversation between the applicant and Mr A Dowling prior to the Notice being issued, reports

¹⁸ Letter from G and R Commission dated 4 May 2016, in Patterson statement [attachment SP25]

and records related to the applicant's alleged disability which the applicant had obtained by a subpoena, and records of the applicant's engagement with the Club.

Applicant's contentions

12. The applicant alleged that he suffers from PTSD, an acquired brain injury following a car accident, and anxiety and this is the disability upon which he relies for his claim. He argued that his disability means he can be very focused at times and comprehend detailed legislation and his rights under laws,¹⁹ for example, understand and pursue his rights about claiming money from old tickets. Also he stated that his disability leads him to gamble: "I couldn't get my psychologist report...I do gamble but it's because of my intellectual ability or disability, it's a distraction for me. My mind just constantly keeps running. So playing poker machines is a distraction to me, I know you can't beat them but I try...".²⁰
13. The issues Mr Johnston argued in support of his discrimination complaint were wide-ranging. He claimed that the exclusion that the club placed upon him was unlawful.²¹ He also claimed that the Notice was generated from incorrect accounts of various reported incidents, and guidelines were not followed particularly by the Gambling Contact Officers (**GCO**). Ms Edwards "made an assumption without any proof of facts and she hasn't actually spoken to me [before she issued the Notice]. The only person who ever actually spoke to me was Adrian [Dowling] and he didn't follow any of the guidelines as to how a GCO should act".²² For example, he stated he "was never offered any assistance... [When Mr Dowling raised issues it] was more of an argument. There was no sensitivity ...".²³ The applicant referred to the 'Assist Problem Gamblers' section of the respondent's 'Responsible Conduct of Gambling Policy'.²⁴ The applicant claimed that Mr Dowling, the manager of the Club at the relevant time, did not pass on information about the applicant's disability, for example to Ms Edwards the GCO who issued the Notice, and he should have since he knew of the applicant's disability. The applicant claimed that Mr Dowling "victimised and

¹⁹ Transcript of proceedings, 5 June 2018, pages 15, 81

²⁰ Transcript of proceedings, 5 June 2018, pages 69- 70

²¹ Transcript of proceedings, 5 June 2018, page 12

²² Transcript of proceedings, 5 June 2018, page 73

²³ Transcript of proceedings, 5 June 2018, page 83

²⁴ Patterson statement [attachment SP6]

bullied and basically witch-hunted” him.²⁵ He claimed that if he, the applicant, “had spoken to Ms Edwards I believe I would have got at least the opportunity for natural justice, to be able to put my case in front of the [Club] committee who makes the decisions on who is excluded... as per the Club’s constitution”.²⁶ This course of action according to the applicant was raised by the then CEO Richard Hogg with Ms Edwards in his email to Ms Edwards dated 29 May 2013.²⁷ The applicant also referred to the case of another club member, NC, who received due process by having the opportunity to appear before the Club committee.²⁸

14. The applicant claimed that he was “unable to play golf due to the Notice”.²⁹ In his oral evidence he explained that he did play golf after he had received the Notice, but understood that as a result of the Notice, once his pre-paid membership for golf expired, then he would not be able to renew it.³⁰ He acknowledged the records of the respondent that showed that he played regularly after the exclusion in May 2013 until 8 September 2013.³¹ He said he couldn’t recall if he tried to renew his golf membership, but he thought he couldn’t renew. Also, because he was told he was excluded from the Spike Bar adjacent to the golf course, the social aspect of golf was gone so he was not as interested in golfing there.³² He denied seeking a suspension of his golfing membership for financial reasons, and said that the note submitted by the respondent in not being dated offered no evidence that he had.³³ He agreed that he started playing golf again regularly on 7 January 2017, as attendance records showed.³⁴
15. The applicant agreed that he was able to access the Club to do his work filling the vending machines, after clarification by Ms Edwards about the scope of the exclusion.³⁵ He said that his income increased from 2013 to 2015.³⁶ But he

²⁵ Transcript of proceedings, 5 June 2018 page 12, also see pages 16 - 17, 74 - 75

²⁶ Transcript of proceedings, 5 June 2018, page 76

²⁷ Transcript of proceedings, 5 June 2018, page 75; Patterson statement [attachment SP27]

²⁸ Transcript of proceedings, 5 June 2018, pages 18, 89; Patterson statement [attachment SP29]

²⁹ Applicant’s submission, 16 April 2018

³⁰ Transcript of proceedings, 5 June 2018, page 15

³¹ Patterson statement, pages 54-55, [attachment SP28]

³² Transcript of proceedings, 5 June 2018, pages 100-102

³³ Transcript of proceedings, 6 June 2018, pages 29-30; exhibit 9

³⁴ Patterson statement [attachment SP28]

³⁵ Transcript of proceedings, 5 June 2018, pages 99, 104; Edwards statement, [attachment SP10]

³⁶ Transcript of proceedings, 6 June 2018, page 42

claimed he stopped work in late 2015 because he “was forced to relive all that had happened each time I was required to fill a vending machine...”,³⁷ and that he did not know that in fact his employer had lost the contract for the vending machines at the Club at this time.³⁸ In his oral evidence he couldn’t at first recall what his subsequent work was, but under cross examination and when shown medical records he agreed that he had worked as a security officer around 2016-17 among other jobs.³⁹

16. The applicant had difficulty remembering many matters, for example when given records of his attendance at the Club the week prior to the hearing he said he wasn’t sure of the details but could recollect that he had “been there recently”⁴⁰. In regard to each of the incidents relied on by the respondent (see paragraphs [17]-[22] below), the applicant’s evidence, largely based on his recollections, is summarised as follows.

Alleged incidents - applicant’s contentions

17. Incidents 1, 2 and 3, between 1 to 2 October 2012, as set out by the respondent at paragraph [30]-[37] below. The applicant said he had no recollection of these incidents.
18. Incident 4, an email dated 29 October 2012 from Mr Dowling copied to Ms Edwards, about a report from the day before where “Todd Johnston...brought in about 70 pokie machine payout tickets worth \$1 or less (most about 10 cents and 30 cents)....”.⁴¹ The applicant explained that he didn’t recall that and “nowhere ...does it state or show or prove that I was actually the person who claimed these tickets”.⁴²
19. Incident 5, duty manager shift report dated 10 January 2013 sent to Mr Dowling and Ms Edwards, stating “gambling report has been issued for Todd Johnston as he came back in with +200 tickets to cash”, the tickets being worth a small sum

³⁷ Applicant’s submission dated 16 April 2018

³⁸ Transcript of proceedings, 6 June 2018, pages 15-16; Exhibit 8

³⁹ Transcript of proceedings, 6 June 2018, pages 43, 57-58

⁴⁰ Transcript of proceedings, 5 June 2018, page 71

⁴¹ Edwards statement, [attachment BE3]

⁴² Transcript of proceedings, 5 June 2018, page 79

of money in total.⁴³ The applicant agreed that he had brought the tickets in to be cashed and explained that it is his right and he was short of money at the time; “my money is my money, whether it is 20 cents, whether it is \$20”.⁴⁴ He denied that he had scavenged other’s tickets for “abandoned credits”, as the respondent asserted in a letter dated 21 January 2016,⁴⁵ said that the respondent had no CCTV footage to prove this assertion.⁴⁶

20. Incident 6, email from Mr Dowling to the Duty Manager dated 31 January 2013 with the subject heading ‘Todd Johnston’, stating that Mr Dowling has met with “Todd Johnston to discuss his recent behaviour in the gaming areas...”⁴⁷ The applicant claimed that the conversation occurred on 21 January 2013 because he had a date-stamped recording of part of it on his phone – the applicant submitted a transcript of the recording in evidence and played the recording in the hearing.⁴⁸
21. Incident 7, AF and SC Incident Report dated 10 May 2013 created by A Stonell, Duty Manager, which stated “found Todd arguing with bar staff, asked Todd to leave, escorted him to the front of door”, and it recommended as follows: “exclude Todd, he is a persistent nuisance and keeps attempting to cause problems”.⁴⁹ The applicant pointed out that this report didn’t mention a gambling issue.
22. Incident 8, AF and SC Gambling Incident Register dated 10 May 2013 created by Ms Elise Farrell, describing an incident after the hopper had short-changed him by \$1.⁵⁰ The applicant claimed that there was “lot of abuse and belittling behaviour by the staff and management because I was unable to claim [the \$1] through the auto claim machine...it took time”; that he was not intoxicated but was nonetheless banned from the bar: “[Ms Farrell] was picking on me over my \$1”, she did not know I had a disability; that he was not threatening; and that staff misconceived his behaviour in that his speech is effected by his disability which

⁴³ Edwards statement, [attachment BE9]; Patterson statement, [attachment SP16]

⁴⁴ Transcript of proceedings, 5 June 2018, pages 80-81

⁴⁵ Patterson statement, [attachment SP24]

⁴⁶ Transcript of proceedings, 6 June 2018, page 122

⁴⁷ Edwards statement, [attachment BE10]

⁴⁸ Applicant’s submission dated 16 April 2018

⁴⁹ Edwards statement, [attachment BE11]

⁵⁰ Edwards statement, [attachment BE5]

can make persons like him “sound like they’re slurring even though they’re not intoxicated”⁵¹. He claimed that Ms Farrell filled out the report with “Adrian [Dowling] signing off on it so coercion”.⁵²

Respondent’s contentions

23. The respondent’s contentions were comprehensively set out in their written and oral submissions. In summary, the respondent claimed that the Notice was necessary under clause 1.14 of the Code which states “that the licensee of a gambling facility must exclude a person from gambling at the facility if the licensee has reasonable grounds for believing that a) the welfare of the person, or any person’s dependents is seriously at risk because of the person’s gambling problem; or b) the person is someone whom a deed applies.”(emphasis added). The respondent submitted that clause 1.14 of the Code compelled it in this matter to issue the Notice by use of the word ‘must’ once the GCO, Ms Edwards, had formed the view that she had reasonable grounds for believing the applicant’s gambling problem put his welfare seriously at risk. Mr Patterson stated in his oral evidence that once the conduct occurred that triggered the Code, the respondent had no choice but to deal with it under the Code. The respondent relied on the reported gambling related incidents at the Club involving the applicant from 2012 to 2013. The respondent distinguished the applicant’s case from that of the other member, NC, where behavioural problems did not indicate problem gambling under the Code but were dealt with by internal disciplinary processes set out in the respondent’s constitution.⁵³
24. The respondent accepted the medical evidence that the applicant had a disability in the sense of a loss of function, but did not accept that there was medical evidence to prove any symptoms or manifestations of this disability as alleged by the applicant.⁵⁴ The respondent denied that the respondent’s Notice was issued due to the applicant suffering from a disability. The respondent contended that the applicant had no overt evidence to prove that the respondent issued the Notice

⁵¹ Transcript of proceedings, 5 June 2018, page 84-88

⁵² Transcript of proceedings, 5 June 2018, page 87

⁵³ Transcript of proceedings, 5 June 2018, page 91; further statement of Patterson, dated 29 May 2018

⁵⁴ Respondent’s closing submission dated 27 July 2018 at [24]-[28]

because of his alleged disabilities. The respondent acknowledged the case law, as confirmed in *Kovac*, that it is unusual to find evidence of discrimination and the outcome of discrimination cases can depend on what inferences may be drawn from the primary facts found. The respondent argued that there is insufficient evidence from which to draw any such inferences in this case.⁵⁵

25. The respondent acknowledged that the G and R Commission revoked the Notice to exclude Mr Johnston from the venues. However, they contended that this did not mean that the Notice was discriminatory, as the applicant alleged. Indeed the respondent argued that the revocation by the G and R Commission was due to incomplete evidence being provided to it, and that Mr Johnston's behaviour and actions were consistent with key problem gambling characteristics.⁵⁶ Mr Patterson gave evidence that if the same series of incidents as set out in the reports arose today, even with knowledge of the applicant's disability, the respondent would likely act no differently.⁵⁷
26. Under the Code, GCOs are under strict liability to adhere to its provisions; 'strict liability' in this case means the respondent is liable for any non-compliance regardless of whether it was done through carelessness or if it resulted in no harm. The respondent argued that GCO's have an explicit direction under the Code that if they do not follow it correctly they are likely to be contravening it. The types of behaviour that would alert a GCO to problem gambling are illustrated in section 6A of the GRCA Regulation, and in a similar manner outlined in clause 1.2(1) and (2) of the Code as follows:
 - (a) if the person has difficulty limiting the amount of money or time spent on gambling and this leads to adverse consequences for the person or another person; and/or
 - (b) if the person engages in any of the following behaviour: seeking credit for gambling unless authorised under a gaming law; seeking to borrow or scavenge for money to gamble; seeking assistance or advice about

⁵⁵ Respondent's submission at [35]

⁵⁶ Transcript of proceeding, 6 June 2018, page 115; Patterson response to HRC Claim, page 2

⁵⁷ Transcript of proceeding, 5 June 2018

controlling the person's gambling; or admitting to borrowing or stealing money to gamble.

27. The R and G Commission provided the respondent from time to time with 'Problem Gambling Checklists', an example of which the respondent submitted as evidence – the checklist provides a more detailed list of validated indicators of problem gambling behaviour.⁵⁸ Under the Code the respondent had been compelled to keep a written record of Mr Johnston's gambling conduct. They submitted that having reviewed those written records, Ms Edwards formed the view that there were reasonable grounds for believing that the welfare of Mr Johnston was seriously at risk because of his gambling problem.⁵⁹
28. Ms Edwards provided evidence that she was a certified GCO at the relevant times that she had been properly appointed a Primary Gambling Contact Officer at the Club, and this being so that she was responsible for issuing Notices.⁶⁰ The applicant was identified by Bridgid Edwards, a GCO for the club, as an individual with 'problem gambling' under clause 1.2(2)(b) of the GRCA Regulation on 17 May 2013. Ms Edwards supplied evidence of the reasons why she determined that Mr Johnston was displaying problem gambling behaviour and used this evidence to then issue him with the Notice. Ms Edwards said that she had reasonable grounds for believing that Mr Johnston's welfare was seriously at risk.⁶¹ Ms Edwards specifically cited section 6A of the GRCA Regulation, and also clause 1.2(2) of the Code, as guiding her in forming the view that the applicant exhibited problem gambling behaviour.⁶²
29. There are many annexures and documents attached to Ms Edwards' statement which show reports and emails noting Mr Johnston's behaviour over the 2012 to 2013 period. The respondent claimed that these demonstrated that Ms Edwards could believe on reasonable grounds that the applicant was a problem gambler. The respondent summarised the reports that Ms Edwards relied on as follows.

⁵⁸ Patterson statement, [attachment SP7]

⁵⁹ Respondent's submission dated 18 May 2018 at [40]

⁶⁰ Edwards statement at [2]

⁶¹ Edwards statement at [8]

⁶² Edwards statement at [9]

Alleged incidents – respondent’s contentions

30. Incident 1: Duty Manager shift report 1 October 2012 bearing the name ‘Daniel M’, which states “...will write a gambling report on Todd Johnston. Made an admittance to being addicted to gambling and complaining being ripped off” and a note dated 1 October 2012 states “Todd was complaining about not getting the minor jackpot on a machine... I apologised about not being able to investigate further as the machine had limitations on auditing its game history. Todd began to complain... “Unfair. I am addicted to gambling” ”.⁶³
31. Incident 2: Incident report prepared by Duty Manager of the Gungahlin Club, Adrian Wong, dated 1 October 2012.⁶⁴
32. Incident 3: Email from the Duty manager of Gungahlin Club, Adrian Wong, to Mr Dowling dated 2 October 2012.⁶⁵
33. Incident 4: Email dated 29 October 2012 from Mr Dowling copied to Ms Edwards, about a report from the day before where “Todd Johnston...brought in about 70 pokie machine payout tickets worth \$1 and less (most between 10 cents and 30 cents)... is this considered scrounging for credits...It was really quite annoying....I would suggest this member is showing signs of Problem Gambling in the form of scavenging for money....⁶⁶
34. Incident 5: Duty Manager shift report dated 10 January 2013 sent to Mr Dowling and Ms Edwards, stating “gambling report has been issued for Todd Johnston as he came back in with +200 tickets to cash”.⁶⁷
35. Incident 6: Email from Mr Dowling to the Duty Manager dated 31 January 2013 with the subject heading ‘Todd Johnston’, stating that Mr Dowling has met with “Todd Johnston to discuss his recent behaviour in the gaming areas. I explained to Todd that his behaviour and comments were unusual and indicated that he may have problems with gambling. I advised Todd that his behaviour had been reported and log [sic] in a register for future reference. And that if behaviour of

⁶³ Edwards statement, [attachments BE6, BE7]

⁶⁴ Edwards statement, [attachments BE7]

⁶⁵ Edwards statement, [attachments BE8]

⁶⁶ Edwards statement, [attachment BE3]

⁶⁷ Edwards statement, [attachment BE9]

this nature or other that indicated he may have problems with gambling [sic], would potentially lead the Club (as a duty of care) to consider all avenues to assist him, including mandatory exclusion that would prevent him from utilising the Clubs facilities. Please monitor Todd's behaviour and report back on behaviour that is of concern"⁶⁸

36. Incident 7: AF and SC Incident Report dated 10 May 2013 created by A Stonell, Duty Manager, which stated "found Todd arguing with bar staff, asked Todd to leave, escorted him to the front of door. Recommendation: exclude Todd, he is a persistent nuisance and keeps attempting to cause problems". There is handwritten note by Ms Edwards at the end of this report, dated 17 May 2013, that refers to Adrian Dowling's "issues" with Mr Johnston, and then states, "see entry in Gambling Incident Register 10 January 2013" (i.e. see incident 5 above), and concludes "Given the ongoing gambling issues, Mr Johnston's aggressive behaviour, it was decided to implement a Licensee's Exclusion".⁶⁹
37. Incident 8: AF and SC Gambling Incident Register dated 10 May 2013 created by Ms Elise Farrell, describing an incident of "threatening to sue the club and going to gaming and racing", after the hopper had short-changed him by \$1 at which time he was "slurring his words and it was clear that he was intoxicated", he was argumentative, "extremely angry" saying "You should consider this a threat".⁷⁰
38. Ms Edwards stated that she had no knowledge of Mr Johnston's disability, and that any disability formed no part in her decision to issue the Notice.⁷¹
39. Ms Edwards stated that she recalled little of the reports given the passage of time. However she had contemporaneous documentary evidence that she did review some of the reports above (see incidents 4, 5 and 7),⁷² and she stated that that it was standard procedure to review all gambling related incidents and reports before issuing a Notice and she believed that she had regard to all of the incidents

⁶⁸ Edwards statement, [attachment BE10]

⁶⁹ Edwards statement, [attachment BE11]

⁷⁰ Edwards statement, [attachment BE5]

⁷¹ Edwards statement at [23]

⁷² Edwards statement at [11, 14]

and reports listed above.⁷³ As part of standard practice she did discuss issuing the Notice with the then CEO, Richard Hogg.⁷⁴

40. Mr Patterson agreed in his oral evidence that a Notice of the type issued to the applicant would normally have prevented the applicant from attending all areas of all the respondent's venues. However, the respondent provided evidence that it was agreed shortly after the Notice was issued that in the applicant's case it did not prevent the applicant entering the golf course, the proshop or entering the venues to perform work.⁷⁵ The respondent contended that the applicant was not prevented from conducting his business activities at the Club, that Ms Edwards clarified this with him and that he did attend the Club for this purpose from May 2013 until December 2015.⁷⁶ The respondent provided evidence that in September 2015 the respondent ended the contract with the applicant's employer, and the respondent argued that the applicant's need to enter the Club for work purposes came to an end about this time for this reason.⁷⁷ Also the respondent contended that the applicant "was permitted and did continue to attend [the Club] to play golf from the commencement of the Mandatory Exclusion until he ceased of his own volition".⁷⁸ The respondent produced records that indicated the applicant played golf after the Notice was issued until July 2013, when he asked to have his golf membership suspended.⁷⁹ The respondent also contended that the applicant's claim that he stopped working and stopped attending the club due to the stress arising from the Notice is "either exaggerated or untrue", given records that show he attended the Club from 2016 to 2018, in the applicant's own words "hundreds of times".⁸⁰
41. The respondent denied the applicant had been victimised. The respondent contended that the basis of the applicant's claims in this regard were unclear. The respondent contended that perhaps the clearest statement was made by the applicant during his oral evidence, that the victimisation was by Mr Dowling

⁷³ Edwards statement at [17, 19]

⁷⁴ Edwards statement at [19]; Edwards statement, [attachment BE4]

⁷⁵ Edwards statement, [attachment BE13] at [20]

⁷⁶ Respondents closing submissions, 27 July 2018 at [81]

⁷⁷ Emails re vending machine proposals, September 2015, exhibit 8

⁷⁸ Respondent's closing submissions, 27 July 2018 at [82]

⁷⁹ File note exhibit 9

⁸⁰ Transcript 5 June 2018, pages 68,69; Exhibit 6

following the conversation they had in January 2013, prior to the Notice being issued. The respondent argued that neither the evidence of this conversation or any other evidence in the proceedings supported the applicant's claim of victimisation.⁸¹

Findings

Was there direct discrimination (section 8(2) of the D Act)?

42. The issue of whether the Notice was issued due to the applicant's disability was the main issue for the Tribunal to consider in determining if there was direct discrimination. In *Ezekiel-Hart v Reis and Anor* [2017] ACAT 3 the Tribunal pointed out that section 53A of the HRC Act provides that "it is a rebuttable presumption that discrimination has occurred" if the complainant establishes that the "treatment... is unfavourable" and the complainant presents evidence that "the treatment... is because of a protected attribute" in the absence of any other explanation.⁸² However the Tribunal finds that this rebuttable presumption is not triggered in this case, because the applicant did not present evidence that the Notice was issued because of his disability in the absence of any other explanation. The Tribunal finds that the Notice was not issued because of the applicant's disability.
43. Considering the nature of the applicant's disability first, the Tribunal notes that disability is a protected attribute for the purposes of the D Act (section 7(1)(e) D Act). Disability means "total or partial loss of a bodily or mental function", and importantly includes "behaviour that is a symptom or manifestation of the disability" (section 5AA(1)(a) and (2)(a) of the D Act). The Tribunal accepts the applicant's evidence that he has a disability in the form of a loss of function – the respondent also accepted this – being PTSD, an acquired brain injury following a car accident, and anxiety. His medical evidence also pointed to non-specific "behavioural difficulties" in 1998, and a liability to act in "a manner that is both out of character and at times inappropriate and self-destructive" due to his disability in 2015.⁸³ Other elements of his medical evidence attributed the

⁸¹ Respondents closing submissions, 27 July 2018 at [91-99]

⁸² HRC Act, section 53CA(2)(a) and (b)

⁸³ Dr McLaren, Medico-Legal Report, 8 May 1998 and Dr Bounty, psychologist, letter dated June 2015, Exhibit 1

applicant's "anxiety and low mood" to other factors, not his disability, namely "a direct result of difficulties he is experiencing in his workplace".⁸⁴ The Tribunal notes that the applicant did not provide evidence from a medical professional about what behaviours were associated with his loss of function of any more specificity than that quoted, and did not provide any medical evidence linking his disability to gambling. In the absence of more specific medical evidence, or consistently corroborative evidence, in support of the applicant's claims about certain behaviours being part of his disability, the Tribunal has been unable to find that these behaviours are part of his disability, unable to find that these behaviours are "symptoms or manifestations" of his loss of function. This finding distinguishes this case from the case of *Purvis v NSW (Department of Education and Training)* (2003) 217 CLR 92, where there was evidence accepted by the court that relevant behaviours were part of the applicant's disability.

44. The Tribunal therefore considered whether the Notice was issued because of the applicant's PTSD, acquired brain injury following a car accident, and anxiety. The Tribunal finds that it was not. When considering the cause of any unfavourable treatment, Professor Spender sets out the test for causation in the *Kovac* case as referred to above at paragraph [8]. The Tribunal finds in this case that disability was not a "real or genuine or not insubstantial reason" for doing the act.⁸⁵ The main reason for issuing the Notice was to comply with the Code, and there was a secondary reason being to manage certain "nuisance" behaviours exhibited by the applicant (refer to paragraph [21] above). However there is no evidence that the applicant's disability, being his loss of function, was a reason at all for the issuing of the Notice.
45. A key fact that led the Tribunal to the conclusion that the applicant's disability was not "a real, genuine and not insubstantial reason" for the Notice being issued is as follows. On the applicant's own evidence, none of the five persons who contributed to documents that led to the Notice being issued, including the GCO Ms Edwards who actually issued the Notice, knew of the applicant's disability, except for Mr Dowling. The applicant had told Mr Dowling that his behaviour

⁸⁴ Dr Bounty, psychologist, letter dated March 2012, Exhibit 2

⁸⁵ See *Kovac v The Australian Croatian Club Ltd* [2014] ACAT 41 at [90]

was unusual “...but that’s part of my disability... that fact that I had a car accident... have an acquired brain injury...”⁸⁶ The Tribunal accepts that Mr Dowling did not pass this on to anybody relevant to the issuing of the Notice. It is clear to the Tribunal from the transcript of the conversation between the applicant and Mr Dowling, that Mr Dowling was focused on the applicant’s behaviour possibly linked to a gambling problem, “...I know nothing of your injury. I know of your behaviour here in the Club...”⁸⁷ and that any disability raised by the applicant was not considered relevant by Mr Dowling. While the respondent may be criticised for this poor communication between staff, the fact that this knowledge was not passed on in this case supports the respondent’s contentions that the Notice was not issued by Ms Edwards due to the applicant’s disability.

46. In this case there was no overt evidence that showed that the respondent issued the exclusion notice because of Mr Johnston’s alleged disabilities. Therefore the Tribunal must rely on drawing inferences to find evidence of Mr Johnston’s claim. The Tribunal accepts the argument put by the respondent that there is insufficient evidence from which to draw such inferences in this case.⁸⁸ The Tribunal was guided by the principles for drawing inferences of discrimination as set out in *State of NSW (NSW Police Force) v Whitfield (EOD)* [2012] NSWADTAP 27 as cited by the respondent,⁸⁹ especially as follows:

An adverse inference ought only to be drawn where there is sufficient evidence to reject alternative innocent explanations... and the mere possibility of [an inference being true] is not sufficient to justify an inference to that effect.

Given the above, the Tribunal finds that there is insufficient evidence for the Tribunal to reject the alternative explanations put by the respondent, being compliance with the Code. The Tribunal finds the alternative explanation suggested by the G and R Commission persuasive, being that the respondent was

⁸⁶ Applicant’s submission, transcript of conversation with Mr Dowling, page 31

⁸⁷ Applicant’s submission, transcript 5 June 2018 of conversation with Mr Dowling, page 31

⁸⁸ Respondent submission at [35]

⁸⁹ Respondent’s submissions, 18 May 2018 at [36]

concerned about the applicant's poor behaviour rather than his welfare linked to problem gambling behaviour.

47. The Tribunal acknowledges that the Notice that was issued was revoked by the G and R Commission, however this does not in itself prove that it was issued because of the applicant's disability. On the contrary, the G and R Commission in revoking the Notice stated that "...[t]he incidents recorded by the licensee identified that the licensee may have reasonable grounds to believe Mr Johnston had a gambling problem...".⁹⁰ The Tribunal accepts that the respondent had a series of reports about the applicant that the GCO honestly thought were grounds to issue a Notice. The applicant disputed various aspects of these reports, largely based on his memory. However the Tribunal finds that the applicant's memory is poor, as demonstrated by his inability to even recall days when he had attended the Club in the week prior to the hearing when he gave his oral evidence.⁹¹ His own medical evidence confirmed that he has memory issues.⁹² In any case, the reports were about incidents dating back to October 2012 which many people would find it difficult to accurately recall. The Tribunal prefers the evidence about the series of reports as presented by the respondent since it is based on contemporaneous documentation. Also, aspects of these reports are supported by the applicant's medical evidence, for example, despite denying being intoxicated in the incident number 7 on 10 May 2013 above (paragraphs [22] and [37]), the medical evidence repeatedly notes the applicant's problems with "self-monitoring" his alcohol use, "binge drinking", alcohol abuse.⁹³ The documentation before the Tribunal supports a finding that the GCO, Ms Edwards, honestly formed the view that the applicant was exhibiting the sorts of behaviours that would be relevant to considering whether to issue a Notice, and that the applicant's disability was not part of her reasoning. The fact that Ms Edwards appears to have misunderstood the test for issuing the notice, the test involving a consideration of the applicant's welfare not just whether he is exhibiting

⁹⁰ Letter from G and R Commission dated 4 May 2016, in Patterson statement, [attachment SP25]

⁹¹ Transcript of proceedings, 5 June 2018, page 71

⁹² Dr Barraclough, letter dated 29 April 1998; Dr Chandran, letter dated 31 March 1998, both in Exhibit 2

⁹³ Dr McLaren's Medico-Legal Report dated 8 May 1998; Dr McLaren, Discharge Report, dated 2 February 1998; Mental Health Assessment 30 January 2012; all in Exhibit 2

problem gambling behaviours, does not prove that she issued the Notice because of the applicant's disability.

48. The applicant argued that there was non-compliance with procedures under the Code in the lead-up to the issuing of the Notice. For example, the applicant stated in his oral evidence that the following did not occur: the GCO "must take reasonable steps... to discuss the possible gambling problem with the person... and give the person advice or information about counselling and advisory services... and any other appropriate action that may be taken by the person, including the opportunity to sign a deed of exclusion...".⁹⁴ The respondent disputed this assertion,⁹⁵ however the Tribunal accepts that non-compliance by the respondent with the latter procedure under the Code appears to have occurred. While Mr Dowling did have a conversation with the applicant, it appears that he did not canvass all the aspects required of him as a GCO under the Code. Ms Edwards, being the GCO who issued the Notice, did not herself speak to the applicant, and it appears to the Tribunal that it would have been sensitive and prudent for her to have done so. The applicant appears to have not been personally offered any assistance for any gambling issues he may have had, and he was not advised that he could sign a deed of exclusion, that is, set up a self-exclusion arrangement. Any non-compliance with the latter key elements of the Code is not to be condoned. However the Tribunal makes no findings about whether this non-compliance did occur, for the reason that even if such non-compliance occurred, it does not prove that the Notice was issued because of the applicant's disability.
49. In making the above finding it is not necessary for the Tribunal to consider whether the other elements of direct discrimination are met. However, the Tribunal notes that the respondent argued that the applicant was not treated unfavourably. The Tribunal suggests that on any common-sense test of unfavourable treatment, the issuing of the Notice in circumstances where it was mandatory and not agreed, is unfavourable treatment. It resulted in the applicant being then mandatorily excluded from most of the Club he liked to regularly attend.

⁹⁴ Section 1.11 (3), the Code

⁹⁵ Respondent's closing submission, dated 27 July 2018 at [43-61]

Was there indirect discrimination (section 8(3) of the D Act)?

50. For the reasons given above (see paragraphs [42] to [48]), the Tribunal finds that any imposition of a condition that had the effect of disadvantaging the applicant was not because the applicant has a disability. On this basis the applicant's claim that he was indirectly discriminated against fails, and the Tribunal need make no further findings in this regard.
51. The Tribunal notes that the respondent contended that it issued the Notice due to the club's "strict liability and obligations under the Code and Regulation", and that the applicant "is unable to make out any identifiable particular requirement or condition or that the respondent imposed any such requirement or condition on him".⁹⁶ The Tribunal suggests that these contentions are problematic. The Tribunal suggests that the GCO was not obliged to blindly issue the Notice, and rather had to form a view about whether the behaviours were well-evidenced, were those associated with problem gambling, and whether the Code was being complied with, especially 1.11(3) of the Code. On this basis the Tribunal regards it as problematic to accept that the respondent did not 'impose' any requirement on the applicant.

Was the Notice an act done under statutory authority (D Act section 30(1)(a))?

52. The D Act does not make unlawful anything done necessarily for the purpose of complying with a requirement of a Territory law (section 30(1) of the D Act). The respondent contended that if it was found to have discriminated against the applicant then this provision provided a complete defence.⁹⁷ The Tribunal rejects the respondent's argument in this case. Given the Notice was revoked by the G and R Commission, it is not logical to also say that the issuing of it was required. If the Notice had been valid, this might have been a successful defence for the respondent.

⁹⁶ Respondent's submission dated 18 May 2018 at [61] and [64]

⁹⁷ Respondent's submission dated 18 May 2018, [38]-[42]; Respondent's submission, dated 27 July 2018 at [71]-[74], [89]-[90]

Was the applicant victimised (D Act section 68)?

53. The Tribunal finds that the applicant was not victimised. The best evidence the applicant presented was that he raised with Mr Dowling in his conversation in January 2013 that “I’m being discriminated against here”.⁹⁸ However, there was no evidence that Mr Dowling then conducted a “witch-hunt” against the applicant due to this issue being raised by the applicant, as the applicant alleged. The evidence is that Mr Dowling, like the GCO, Ms Edwards, acted in a manner that he thought was required under the Code, and not out of any motive to victimise the applicant.

Conclusion

54. The applicant was not discriminated against by the respondent in issuing the Notice. The Tribunal finds that the GCO who issued the Notice was genuinely motivated to comply with the Code, she had no knowledge of the applicant’s disability, and she did have reasonable grounds for believing that the applicant was a problem gambler. It appears to the Tribunal that the process for issuing the Notice was less than ideal if one considers the requirements of the Code and the respondent’s internal procedures, and that the GCO may have misunderstood the full requirements for issuing a Notice particularly the requirement that “welfare” be at risk.⁹⁹ One of the incident reports the GCO relied on was related to nuisance behaviour, not necessarily problem gambling behaviour. It is not surprising that the G and R Commission revoked the Notice. However, in this case, this turn of events provides no basis for finding discrimination was a factor in the issuing of the Notice. The Tribunal finds that in this case, given the Notice was revoked, issuing it was not an act done under statutory authority. The latter defence under section 30(1) of the D Act should not be used to justify otherwise discriminatory acts in circumstances where the statute has not been complied with. The Tribunal finds that there is no evidence that the applicant was victimised. The Tribunal reserves its decision on costs.

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Senior Member L Beacroft

⁹⁸ Transcript of conversation with Mr Dowling, applicant’s submission, 16 April 2018

⁹⁹ 1.14 of the Code

HEARING DETAILS

FILE NUMBER:	DT 3/2018
PARTIES, APPLICANT:	Todd Johnston
PARTIES, RESPONDENT:	Ainslie Football and Social Club Limited
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	Ms P Thew
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	Clyde & Co
TRIBUNAL MEMBERS:	Senior Member L Beacroft
DATES OF HEARING:	5 June 2018 6 June 2018