# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Lightning Bolt Co Pty Ltd v Skinner & Anor* [2002] QSC 062 |
| PARTIES: | **LIGHTNING BOLT CO PTY LTD** ACN 050 410 252 (appellant/respondent)<br><br>**v**<br><br>**MICHAEL THOMAS BYATT SKINNER**<br>(first respondent/complainant)<br><br>**DAVID CLARENCE SMITH**<br>(second respondent/complainant) |
| FILE NO/S: | Appeal No 6857 of 2001 |
| DIVISION: | Trial Division |
| PROCEEDING: | Appeal |
| ORIGINATING COURT: | Anti-Discrimination Tribunal |
| DELIVERED ON: | 22 March 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 9 November 2001 |
| JUDGES: | Fryberg J |
| ORDER: | **Appeal dismissed** |
| CATCHWORDS: | DISCRIMINATION LAW – *Anti-Discrimination Act* 1991 (Qld) – Age discrimination – Dismissal from employment – Whether direct discrimination – Whether tribunal's findings inconsistent – Whether a more probable and innocent explanation was available on the evidence.<br><br>*Acts Interpretation Act* 1954 (Qld), s 27B<br>*Anti-Discrimination Act* 1991, s 10(3), s 10(4), s 136, s 211, s 217(1)<br><br>*Department of Health v Arumugam* [1988] VR 319, referred to<br>*Edwards v The Queen* (1993) 178 CLR 193, referred to<br>*State of Victoria v McKenna* [1999] VSC 310, 27 August 1999, referred to |
| COUNSEL: | J E Murdoch SC for the appellant<br>A A J Horneman-Wren for the first and second respondents |
| SOLICITORS: | Dibbs Barker Gosling for the appellant<br>Steinitz & Associates for the first and second respondents |

[1] **FRYBERG J:** The appellant employer, Lightning Bolt Co Pty Ltd ("Lightning Bolt"), was the unsuccessful respondent in the Anti-Discrimination Tribunal to a complaint lodged under s 136 of the *Anti-Discrimination Act* 1991 ("the Act") by the present respondents, dismissed employees of Lightning Bolt. On 4 July 2000, the Tribunal, constituted by Mr L F Wyvill QC, found that Lightning Bolt had contravened the Act and made orders for compensation and costs against it. The Tribunal found that a substantial reason for the respondents' dismissal was their age. Lightning Bolt now appeals against those orders.

[2] Lightning Bolt carried on business manufacturing and selling a variety of fasteners such as nuts, bolts and screws. It employed the respondents (both of whom were skilled and experienced in fastenings stores) as storemen. On 31 March 2000, after a period of employment of approximately three months, both men were dismissed. The reason for their dismissal, according to the Employment Separation Certificates signed by Lightning Bolt and provided to them, was "Insufficient work owing to a down turn in trade". On 10 April, Lightning Bolt employed two younger and inexperienced men, Mr Anderson and Mr La Macchia, to do the work previously done by the respondents.

[3] In their points of claim filed in the Tribunal, the respondents contended that they had been dismissed because of the appellant's desire to replace them with younger men. Lightning Bolt's contentions in its points of defence were (so far as is relevant):

> "1. The applicant claims that his employment with the respondent was terminated because of his age. This is incorrect.
>
> 2. The applicant was terminated due to lack of work caused by a number of factors including a large customer of the respondent being placed into administration and ultimately into liquidation."

[4] The Tribunal delivered its reasons in writing, as required by the Act.[1] They occupied more than 30 pages of double-spaced typescript and dealt with each of the issues defined by the parties in the pleadings. They quoted the relevant legislation and referred to the onus and standard of proof applicable. They set out the Tribunal's findings on credibility[2] and gave reasons for those findings. On the substantive issues, the Tribunal found that there was no lack of work for the respondents at the time of their dismissal and that the loss of business from Websters Products Pty Ltd (the "large customer") did not give rise to a need to reduce the number of storemen employed. He further found that the respondents were not dismissed as a step in a cost-reduction exercise. He concluded that a substantial reason for the respondents' dismissal was their age and found that in dismissing them, Lightning Bolt contravened the Act.

[5] In its outline of submissions to this Court, Lightning Bolt argued that the Tribunal failed to set out the findings of fact on which that conclusion depended, and the reasoning which led him to it. That, it was submitted, amounted to an error of law.[3]

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1 *Anti-Discrimination Act* 1991, s 211; see also *Acts Interpretation Act* 1954, s 27B.

2 He found that the evidence of Mr O'Neil, Managing Director of Lightning Bolt and Mr Greenfield, General Manager, required close scrutiny and that some of their evidence was "quite misleading".

3 An appeal lies only on an error of law: *Anti-Discrimination Act* 1991, s 217(1).

In argument, counsel expanded that to include the proposition that there was no evidence to support the Tribunal's ultimate conclusion; and that the Tribunal made an inference or inferences inconsistent with his own findings of fact.

[6] Lightning Bolt did not challenge the Tribunal's rejection of its explanations for the dismissal of the respondents, nor his findings on the credibility of its two principal officers. It was not open to it to do so. It submitted that if all that is proved, by inference or otherwise, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of the proof required. That proposition is founded on a dictum of Fullagar J in *Department of Health v Arumugam*.[4] It may be accepted as correct for present purposes, although it should be noted that it has been criticised[5] and in some respects doubted.[6] It should also be noted that Fullagar J was not dealing with a case where rejection of a defendant's explanation involved a finding that the defendant had lied or otherwise conducted himself in such a manner as to indicate a consciousness of guilt.[7] In the present case, the Tribunal did not adopt a reasoning process in conflict with the dictum. Having rejected Lightning Bolt's various explanations for its conduct, the Tribunal expressly considered the question of whether the respondents were dismissed because Lightning Bolt desired to employ younger men in their place. He concluded that they were.

[7] Counsel for Lightning Bolt criticised this part of the Tribunal's reasons in several ways. First he submitted that to reach his conclusion, the Tribunal should first have found that the company treated the respondents less favourably than younger men, for example Mr Anderson and Mr La Macchia. That submission arose out of the definition of "direct discrimination" in the Act:

> "10(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different."

[8] The act of discrimination alleged against Lightning Bolt was dismissal of the respondents, but it was never alleged that the company dismissed the respondents while not dismissing other, younger storemen. The respondents were the only storemen employed by Lightning Bolt. The dismissals were alleged to have been discrimination because the respondents were treated less favourably (by being dismissed) than young men would have been treated in similar circumstances. It was not necessary for the Tribunal to have found that they were in fact treated less favourably than younger men, whether the two replacements or anyone else. It was, of course, necessary for the Tribunal to have found that young men would not have been dismissed in similar circumstances, but that is implicit in the Tribunal's finding that a substantial reason for the dismissal was the respondents' age.

[9] Lightning Bolt's submission did not stop there, however. It submitted that such a finding could not have been implicit, or could not properly have been implicit,

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4 [1988] VR 319.

5 Gaze: "Problems of Proof In Equal Opportunity Cases" (1989) *Law Institute Journal* 731.

6 *State of Victoria v McKenna* [1999] VSC 310 (unreported, 27 August 1999, Smith J).

7 Compare *Edwards v The Queen* (1993) 178 CLR 193.

because it was inconsistent with another express finding of the Tribunal; and because another more probable and innocent explanation was open on the evidence.

[10] The express finding relied on by Lightning Bolt was made by the Tribunal in its consideration of why the respondents were dismissed:

> "Neither Mr Skinner nor Mr Smith was ambitious of advancing beyond store work. Mr Skinner told Mr Leclos that he was interested in becoming head storeman. While Mr Skinner and Mr Smith remained in the store their presence to some extent inhibited the development of a small pool of staff trained in the respondent's procedures who could be promoted to other areas such as counter or external sales as the need arose and, wherever they were, could be called back to help in the store if the need arose."

[11] It is arguable that this was not so much a finding by the Tribunal as a recording of the respondents' argument. However, I am prepared to assume, in conformity with Lightning Bolt's submission, that it is the former.

[12] In my judgment there is no inconsistency between that finding and the finding that a substantial reason for the respondents' dismissal was their age. Ambition is not necessarily a characteristic of the young, but neither can it be said that they are necessarily devoid of it. There is no inconsistency between desiring to employ people who are ambitious to advance beyond store work and who could be part of a trained pool who could be promoted to other areas as the need arose; and desiring to employ young people.

[13] Lightning Bolt's alternative formulation of this point was that, given this finding, it is likely that this was the real reason that the respondents were dismissed. It was submitted that this was a more probable and innocent explanation open on the evidence. Of course, it had not advanced this argument in the Tribunal. Whether this submission raises a point of law is debatable,[8] but I need not decide that question. The passage in the Tribunal's reasons quoted above continued:

> "Furthermore, as the respondent's experience with Mr Smith showed, people with experience of work in the fastener industry outside the respondent's store might be more insistent on changes being made to working conditions that appeared to them to be inefficient or unsafe. *If they were younger they were also likely to be fitter*."[9]

[14] The finding was, therefore, only the first of three. The last of them was plainly one relating to age. Section 10 of the Act provides:

> "(4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment."

[15] At least one of the findings made by the Tribunal related to age and the Tribunal found that it was a substantial reason for the dismissals. The explanation favoured by Lightning Bolt is not the only one open on the evidence; it is not the only one found by the Tribunal; and it does not invalidate the Tribunal's conclusion.

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8 See *State of Victoria v McKenna* (supra).

9 My emphasis.

[16] Counsel attempted to deal with this difficulty by submitting that the Tribunal's finding relating to age must necessarily be characterised as one of indirect discrimination, not direct discrimination. Since the case was conducted as one of direct discrimination or nothing, it was argued, the finding could not be relied upon. It is true that the case before the Tribunal was one of direct discrimination. However, a person's motive for discriminating is irrelevant.[10] It is of no consequence if Lightning Bolt believed that younger people were also likely to be fitter if it has treated the respondents differently on the basis of their age. That is what the Tribunal has found occurred. Indirect discrimination might arise if an employer chose to dismiss people on the ground of lack of fitness and it was found that this operated to affect a higher proportion of older people than younger people. That was not the respondents' case, nor was it what the Tribunal found.

[17] The appellant further contended that an inference of discrimination was not open on the evidence. It is sufficient to say that I reject that submission in the light of the evidence set out in the Tribunal's reasons. The respondents' evidence was carefully analysed and was accepted. The Tribunal rejected Mr Greenfield's explanation, on behalf of Lightning Bolt, of why he did not offer the respondents their jobs back, finding his evidence in relation to Mr Skinner "completely untrue". Mr O'Neil acknowledged that the "philosophy" of getting young and ambitious storemen who would be easier to train and who could later go out on the road as sales representatives, urged on him by one of Lightning Bolt's salesmen a few weeks before he dismissed the respondents, was in fact applied in the appointment of the respondents' replacements, but said that this was "by chance". Once Lightning Bolt's dishonest explanations were rejected, the Tribunal could draw the available inferences with greater certainty.[11] It did so.

[18] The appeal should be dismissed.

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10 Section 10(3).

11 *Department of Health v Arumugam* (supra) at p 330.