SUPREME COURT OF QUEENSLAND

CITATION:	*Dovedeen Pty Ltd & Anor v GK* [2013] QCA 116
PARTIES:	**DOVEDEEN PTY LTD** (first applicant) **JOAN HARTLEY** (second applicant) **v** **GK** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (amicus curiae)
FILE NO/S:	Appeal No 7794 of 2012 QCAT No 416 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	17 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2013
JUDGES:	Fraser and Gotterson JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, Fraser and Gotterson JJA concurring as to the orders made, Margaret Wilson J dissenting in part
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. Set aside the decision and orders made by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal on 31 July 2012.** **4. In lieu thereof, order that the appeal to the Appeal Tribunal against the decision of the Queensland Civil and Administrative Tribunal made on 25 October 2011 be dismissed.** **5. Leave to the parties to make submissions in accordance with paragraph 52 of Practice Direction No 2 of 2010 as to the costs of the proceedings in the Court of Appeal and of the appeal to the Appeal Tribunal in the Queensland Civil and Administrative Tribunal.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION – GROUNDS OF DISCRIMINATION – DISCRIMINATION DUE TO STATUS – where the first applicant trades as a motel, and the second applicant is a director and manager of that motel – where the respondent was a self-employed sex worker who stayed at the motel for the purposes of prostitution – where the second applicant refused the respondent accommodation in the future – where the respondent accepted that she had been refused accommodation because she was performing the work of a sex worker at the motel – where s 7(l) of the *Anti-Discrimination Act* 1991 ('the Act') prohibits discrimination on the basis of the attribute of 'lawful sexual activity' – where Schedule 2 of the Act defines 'lawful sexual activity' as 'a person's status as a lawfully employed sex worker, whether or not self-employed' – where the Appeal Tribunal found, and the respondent contended, that the definition of 'lawful sexual activity' should be read to include the carrying on of such activity at the time the conduct occurred – whether the Appeal Tribunal correctly applied the definition 'lawful sexual activity' – whether the respondent suffered discrimination because of her 'status as a lawfully employed sex-worker'

HUMAN RIGHTS – DISCRIMINATION – DIRECT DISCRIMINATION – where the respondent complained of direct discrimination on the basis of her attribute of 'lawful sexual activity' within the meaning of s 10(1) of the Act – where the respondent contended that the discrimination occurred in the pre-accommodation area as prescribed in ss 82 and 83 of the Act – where the Tribunal member found the appropriate comparator was a person without the attribute of a 'lawful sex worker' but who was seeking accommodation for the purpose of prostitution – where the Appeal Tribunal concluded that the appropriate comparator was a person seeking accommodation for any lawful purpose, but not for prostitution or lawful sexual activity – whether the Appeal Tribunal erred in applying s 10(1) of the Act

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the Tribunal made a non-publication order which required the respondent to be identified only by initials in the Tribunal proceedings – where the Application for Leave to Appeal and the Notice of Appeal filed in the Court of Appeal adopted the form of title used in the Tribunal to identify the respondent – where the respondent sought a non-publication order in the Court of Appeal – whether a non-publication order should be granted

Acts Interpretation Act 1954 (Qld), s 32A
Anti-Discrimination Act 1991 (Qld), s 6(1), s 7(l), s 8, s 10(1)
Liquor Act 1992 (Qld), s 152

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66, s 124, s 125, s 150

Daniel v Daniel (1906) 4 CLR 563; [1906] HCA 74, considered
IW v City of Perth (1997) 191 CLR 1; [1997] HCA 30, considered
J v L & A Services Pty Ltd (No 2) [1995] 2 Qd R 10; [1993] QCA 12, considered
Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations (1998) 195 CLR 158; [1998] HCA 39, considered
Purvis v New South Wales (2003) 217 CLR 92; [2003] HCA 62, considered

COUNSEL: S W Sheaffe, with D Edwards, for the applicants
R E Reed for the respondent
W Soffronoff QC SG, with J R Jones, for the Attorney-General as amicus curiae

SOLICITORS: Bradley Munt & Co for the applicants
Maurice Blackburn Lawyers for the respondent
Crown Law for the Attorney-General as amicus curiae

[1] **FRASER JA:** GK complained to the Anti-Discrimination Commission that Dovedeen Pty Ltd and Mrs Hartley discriminated against her in relation to the supply of accommodation in Dovedeen Pty Ltd's motel because she "was asked to find accommodation elsewhere because I was a sex worker" and that "[f]uture bookings would not be taken from me because of my occupation as a sex worker". The complaint invoked the prohibition in the *Anti-Discrimination Act* 1991 of direct discrimination in the supply of accommodation on the basis of the attribute expressed in s 7(l) of the Act as "(l) lawful sexual activity". The Act defines that expression as meaning "a person's status as a lawfully employed sex worker, whether or not self-employed".

[2] The complaint was referred to the Queensland Civil and Administration Tribunal. After a hearing, a Tribunal member rejected the complaint on the ground that GK was not refused accommodation "because of her occupation as a sex worker" but because Dovedeen Pty Ltd and Mrs Hartley "did not want prostitution undertaken in their motel".[1] GK pursued an internal appeal against that decision to the Appeal Tribunal of the Queensland Civil and Administration Tribunal. The Appeal Tribunal upheld the appeal.

[3] Dovedeen Pty Ltd and Mrs Hartley have now applied for leave to appeal against the Appeal Tribunal's decision. The central issue in their proposed appeal is whether the Appeal Tribunal erred in law in holding that the relevant prohibition in the *Anti-Discrimination Act* 1991 comprehends "…the treatment of a person less favourably because he or she carries on lawful sexual activity on … particular premises..."[2] For the following reasons I would hold that this was an error of law, the application for leave to appeal should be granted, and the appeal should be allowed.

---

1 *GK v Dovedeen Pty Ltd & Anor (No 3)* [2011] QCAT 509 at [44].
2 *GK v Dovedeen Pty Ltd & Anor* [2012] QCATA 128 at [20].

Summary of relevant evidence in the Tribunal

[4] There was no challenge to the accuracy of the summary of the evidence in the reasons of the Tribunal member. Dovedeen Pty Ltd trades as the Drovers Rest Motel at Moranbah. Mrs Hartley is a director of Dovedeen Pty Ltd, a manager of the motel, and a licensee of the liquor licence for the motel. GK gave evidence in the hearing before the Tribunal member. GK was a self-employed sex worker. She had stayed at the motel for the purposes of prostitution one or two nights every one or two months during the two years before June 2010.[3] Up to eight clients a day visited her room for the purpose of prostitution, from which she earned more than $2,000 per day.[4] On 28 June 2010 GK was a paying guest at the motel. She engaged in prostitution during her stay there. When she went to the motel reception on the following day to settle her account Mrs Hartley told her that the next time she came to Moranbah she would have to stay somewhere else. Mrs Hartley said that she was not going to allow prostitution in her motel. GK was charged $200 for accommodation, which exceeded the usual nightly rate of $135. Mrs Hartley told GK that this was because it took cleaners twice as long to clean her room, which Mrs Hartley said was disgusting. GK denied that and, after a complaint, her bank reversed the $200 which had been debited to her credit card, with the result that Dovedeen Pty Ltd was not paid anything for GK's accommodation.[5] GK acknowledged that she had not been refused accommodation at the Drovers Rest in her own capacity, but rather because she was "performing the work of a sex worker at the motel".[6]

[5] Mrs Hartley gave evidence that on 28 June 2010 she watched men come and go from the room which had been rented to GK. On one occasion she called out to a young man who was wandering through the motel; he said he was looking for that room.[7] Mrs Hartley said that another motel guest (who was not called to give evidence) complained about "men coming and going from GK's room".[8]

[6] Mr Hartley, who was also a director of Dovedeen Pty Ltd and a licensee of its liquor licence, gave evidence that his understanding was that "legally he could not allow people to operate out of the room to, for example sell shirts, do tax returns or anything else", and that his understanding of a "business" which was not approved for conduct at the motel "might be selling shirts or working as a working girl".[9] Mr Hartley gave evidence that "he understood the legal position to be that he could not discriminate against a 'working girl' as such, but that under the *Liquor Act* 1992 he could not allow her to use the room for her work."[10]

Anti-Discrimination Act 1991

[7] Since those events the *Anti-Discrimination Act* 1991 has been amended to make it very clear that a complaint of discrimination on the basis of lawful sexual activity in the provision of accommodation could not succeed in these circumstances.[11] That

---

3 [2011] QCAT 509 at [12].
4 [2011] QCAT 509 at [97].
5 [2011] QCAT 509 at [10]-[11].
6 [2011] QCAT 509 at [17].
7 [2011] QCAT 509 at [39].
8 [2011] QCAT 509 at [31].
9 [2011] QCAT 509 at [32], [35].
10 [2011] QCAT 509 at [33].
11 *Anti-Discrimination Act* 1991, s 106C.

amendment commenced after the relevant events in this case and does not apply in this application. It is necessary to apply the provisions of the *Anti-Discrimination Act* 1991 in the form it was in on 29 June 2010.

[8] A purpose of the Act "is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation."[12] The Act provides that this purpose is to be achieved by prohibiting discrimination that is on specified grounds, of specified types, and in specified areas of activity, unless a specified exemption applies.[13] No exemption is relevant in this case. In Pt 2 of the Act, s 7 provides that the Act prohibits discrimination on the basis of attributes listed in that section. As I have mentioned, the relevant attribute in s 7 is "(l) lawful sexual activity", an expression which is defined in the Act to mean "a person's status as a lawfully employed sex worker, whether or not self-employed." The effect of that definition is important in the resolution of this matter.

[9] Section 8 of the Act, also in Pt 2, provides:

> "Meaning of discrimination on the basis of an attribute
> Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of—
> (a) a characteristic that a person with any of the attributes generally has; or
> (b) a characteristic that is often imputed to a person with any of the attributes; or
> (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
> (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.
> *Example of paragraph (c)—*
> If an employer refused to consider a written application from a person called Viv because it assumed Viv was female, the employer would have discriminated on the basis of an attribute (female sex) that Viv (a male) was presumed to have."

[10] The prohibited "types of discrimination" are expressed in s 9, in Pt 3 of the Act, as "direct discrimination" and "indirect discrimination". GK complained of "direct discrimination". The meaning of that term is explained in s 10. For present purposes it is necessary to set out only s 10(1):

> "(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.
> *Example—*
> R refuses to rent a flat to C because—
> • C is English and R doesn't like English people
> • C's friend, B, is English and R doesn't like English people
> • R believes that English people are unreliable tenants.
> In each case, R discriminates against C, whether or not R's belief about C's or B's nationality, or the characteristics of people of that nationality, is correct."

---

12 *Anti-Discrimination Act* 1991, s 6(1).
13 *Anti-Discrimination Act* 1991, s 6(2).

[11] The areas of activity set out in Pt 4 of the Act in which discrimination is prohibited include (in s 82) discrimination in the "pre-accommodation area" (including, in (a), "by failing to accept an application for accommodation") and, in s 83, the "accommodation area" (including "(a) in any variation of the terms on which accommodation is supplied" and "(d) by treating the other person unfavourably in any way in connection with the accommodation"). It was not in issue in this Court that if there was prohibited discrimination in this case it occurred in the accommodation or pre-accommodation area prescribed in Pt 4 of the Act.

Tribunal member's decision

[12] The Tribunal member found that "GK was told in effect, that she would not be provided with accommodation at the Drovers Rest in future because she had engaged in prostitution whilst at the Drovers Rest in the past and the proprietors did not want her to engage in prostitution during any future stay",[14] and that "Mr and Mrs Hartley were not refusing future accommodation to GK because of her occupation as a sex worker, but rather because they did not want prostitution undertaken in their motel".[15] The Tribunal member then applied the test expressed in s 10(1) of the Act by comparing the treatment accorded to GK with the treatment which would have been accorded to "a person without GK's attribute as a lawfully employed sex worker, but with the same desire to obtain a room for the purpose of prostitution".[16] The Tribunal member concluded that because any person wishing to engage in prostitution would have been denied accommodation, GK was not treated less favourably than another person who was not a lawfully employed sex worker where that other person sought a room for the purpose of engaging in prostitution; for that reason, GK was not the subject of direct discrimination.[17]

[13] The Tribunal member also held that, if, contrary to that conclusion, GK was subjected to direct discrimination, s 152 of the *Liquor Act* 1992 would have operated to permit the licensee of the motel "to take steps to ensure a business is not conducted from the motel other than the provision of accommodation, without infringing section 81 of the *Anti-Discrimination Act 1991*." Section 152 of the *Liquor Act* 1992 relevantly provided that "(1) A licensee must not, without the chief executive's prior approval … (a) conduct or permit to be conducted … on the licensed premises, a business other than … that authorised by the licence …".

Appeal Tribunal's decision

[14] GK pursued an internal appeal to the Appeal Tribunal constituted under the *Queensland Civil and Administrative Tribunal Act* 2009. The appeal was allowed. The Appeal Tribunal found that the conduct of Dovedeen Pty Ltd and Mrs Hartley on 29 June 2010 was in contravention of ss 82 and 83 of the *Anti-Discrimination Act* 1991. The complaint was remitted for further hearing as to what relief, including any compensation or orders for apology, ought to be granted.

[15] The Appeal Tribunal held that it was wrong to suggest that the applicable provisions of the *Anti-Discrimination Act* 1991 "have such limited operation as to mean that the only kind of discrimination which is prohibited is not the treatment of a person

---

14 [2011] QCAT 509 at [43].
15 [2011] QCAT 509 at [44].
16 [2011] QCAT 509 at [76].
17 [2011] QCAT 509 at [79].

less favourably because he or she carries on lawful sexual activity on those particular premises, but only if they are treated less favourably, in circumstances in which they are not carrying out that activity but have a status, or reputation or character of being a sex worker which the discriminator determines is such as to justify different treatment of that person."[18]

Application for leave to appeal and the proposed appeal

[16] In accordance with the Court of Appeal's usual practice, full argument was heard on the proposed appeal from the Appeal Tribunal's decision on the footing that, if leave to appeal were granted, the appeal would be determined at the same time. The Attorney-General was given leave to appear for the purpose of assisting the Court by making submissions as to the proper construction of the term "lawful sexual activity" in s 7(l) of the *Anti-Discrimination Act* 1991.

[17] The Notice of Appeal includes six grounds of appeal. Two grounds challenge findings of fact. As counsel for Dovedeen Pty Ltd and Mrs Hartley acknowledged in the course of submissions, those grounds must fail because the appeal may be made only on a question of law.[19] Dovedeen Pty Ltd and Mrs Hartley did not pursue arguments which relate to s 152 of the *Liquor Act* 1992 and Ch 22A of the *Criminal Code*. Nor was any argument presented in support of the ground that the Appeal Tribunal "erred in finding that the Anti-Discrimination Act ought to be construed so as to prefer the business interests of the sex worker to those of the motel …". It is therefore necessary to consider only the remaining grounds of appeal:

> "(ii) The Tribunal erred in finding that there was no distinction between a person's status of a lawfully employed sex worker and the engagement of sex work by that sex worker.
>
> (iii) The Tribunal erred in finding the appropriate comparator was a person who was seeking to use the motel for any lawful purpose…"

The meaning of "lawful sexual activity" in s 7(l)

[18] Dovedeen Pty Ltd and Mrs Hartley argued that the Appeal Tribunal wrongly did not apply the definition of "lawful sexual activity" as a "person's status as a lawfully employed sex worker". On this topic, the Tribunal member considered that, in light of the statutory definition, s 7 of the Act prohibited discrimination "because of a person's job descriptor as a sex worker".[20] The Tribunal member observed that it was possible that s 8(a) might catch the conduct of engaging in prostitution on the footing that it was a "characteristic" of a person having the status of a lawfully employed sex worker but that an alternative argument was that engaging in prostitution was the activity undertaken by a sex worker rather than a characteristic or an attribute of a sex worker.[21] The Tribunal member held that it was not necessary to determine that point because GK's claim could not succeed even if engaging in prostitution was a characteristic of a lawfully employed sex worker. As

---

18 [2012] QCATA 128 at [20].

19 *Queensland Civil and Administrative Tribunal Act* 2009, s 150(3)(a), with reference to an appeal under s 150(2)(b).

20 [2011] QCAT 509 at [66].

21 [2011] QCAT 509 at [68].

the Appeal Tribunal pointed out,[22] however, the Tribunal member adopted the statutory definition of "lawful sexual activity" in her analysis of the characteristics presumed to be possessed by "another person without the attribute" for the purposes of s 10(1) of the Act.

[19] The Appeal Tribunal concluded, and GK submitted that it was correct in concluding, that "the reference to the attribute of lawful sexual activity means, or at least includes the fact that the relevant person is employed as a sex worker and is lawfully so employed **and either has carried on or carries on such activity at the time when the relevant conduct occurred**."[23] Dovedeen Pty Ltd and Mrs Hartley argued that was an error. That argument should be accepted. The emphasised part of the quote finds no reflection in the statutory definition of "lawful sexual activity" as "a person's status as a lawfully employed sex worker, whether or not self-employed."

[20] As the meaning of "status", the Solicitor General drew the Court's attention to the observation by Griffith CJ in *Daniel v Daniel*[24] that "status" refers to "a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction". The Court was not referred to any law which had such an effect in relation to a self-employed sex worker. Rather, as was submitted for the Attorney-General, when the definition of "lawful sexual activity" is taken into account, the proper construction of the Act is that it prohibits discrimination on the basis that a person is a lawfully employed sex worker.[25] Mr Hartley was right in understanding the law to be that "he could not discriminate against a 'working girl' as such".[26] The relevant distinction is also expressed in GK's own evidence that she had not been refused accommodation at the Drovers Rest in her own capacity, but rather because she was "performing the work of a sex worker at the motel".[27] Discrimination on the basis that she was a lawfully employed sex worker was prohibited, but discrimination on the basis that she proposed to perform work as a sex worker at the motel was not prohibited. Contrary to the Appeal Tribunal's conclusion,[28] the relevant prohibition did not comprehend "…the treatment of a person less favourably because he or she carries on lawful sexual activity on … particular premises..."

[21] That analysis is required by the definition of "lawful sexual activity" as "a person's status as a lawfully employed sex worker, whether or not self-employed." The definition applies "except so far as the context or subject matter otherwise indicates or requires",[29] but there is no such indication or requirement in the context or subject matter of the *Anti-Discrimination Act* 1991. It is impossible to accept that the definition of "lawful sexual activity" was not intended to apply to that term in s 7(l), given that the attributes listed in s 7 are at the heart of the operation of the Act. That this is so is also suggested by the fact that the expression "lawful sexual activity" is used in only one other provision, s 28, which makes it not unlawful to

---

22 [2012] QCATA 128 at [13].
23 [2012] QCATA 128 at [14] (emphasis added).
24 (1906) 4 CLR 563 at 566.
25 Amended outline of submissions on behalf of the Attorney-General, para 13.
26 [2011] QCAT 509 at [33].
27 [2011] QCAT 509 at [17].
28 Cf [2012] QCATA 128 at [20].
29 *Acts Interpretation Act* 1954, s 32A.

discriminate on the basis of lawful sexual activity or gender identity in a work or work-related area if the work involves the care or instruction of minors and the discrimination is reasonably necessary to protect the wellbeing of minors "having regard to all the relevant circumstances of the case, including the person's actions."[30] Consistently with the ordinary meaning of the definition, s 28(1)(b) treats activity ("the person's actions") as a relevant circumstance of the particular case, rather than as an attribute which might form the basis of prohibited discrimination.

[22] If the definition were not present in the Act, the Act could be read as prohibiting discrimination against a person in the supply of accommodation on the basis that the person has engaged in or will engage in lawful sexual activity in that accommodation. The definition precludes that approach by making it clear that the relevant prohibited basis of discrimination is only "a person's status as a lawfully employed sex worker".

[23] Furthermore, of those attributes listed in s 7 which involve engaging in activities, "breastfeeding", "political activity", and "trade union activity" are not defined, suggesting that they are activities within their ordinary meanings. "Religious activity" is defined as meaning "engaging in, not engaging in or refusing to engage in a lawful religious activity." That definition plainly requires the "attribute" of "religious activity" to be treated as an activity or the absence of or refusal to engage in an activity. Each of those provisions may be contrasted with the definition of "lawful sexual activity" as a "status".

[24] The Appeal Tribunal found support for its construction in the "philosophy of this Act".[31] The Appeal Tribunal referred to the first paragraph of the preamble to the Act which set out the Parliament's reasons for enacting the Act, namely, that the international community had long recognised the need "to protect and preserve the principles of dignity and equality for everyone". The Appeal Tribunal emphasised the words "and equality" and observed that the Act was not generally concerned with outlawing acts which might infringe upon the dignity of individuals generally.[32] This reasoning is not persuasive. The very general statement in paragraph 1 of the preamble provides no ground for overlooking the statutory definition of "lawful sexual activity". In *IW v City of Perth*[33] Dawson and Gaudron JJ observed that, "[i]n construing legislation designed to protect basic human rights and dignity, the courts 'have a special responsibility to take account of and give effect to [its] purpose'," [34] that the provisions of the *Equal Opportunity Act* 1984 (WA) "should be construed as widely as their terms permit", and that the term in s 66K(1) of that Act, "services", "should not be given a narrow construction unless that is clearly required by definition or by context." Under the *Anti-Discrimination Act* 1991 the term "lawful sexual activity" in s 7(l) is clearly required to be given its defined meaning.

[25] The Appeal Tribunal referred also to the history of the relevant provisions. When Royal assent to the Act was given on 9 December 1991, s 7 prohibited

---

30 *Anti-Discrimination Act* 1991, s 28(1)(b).

31 [2012] QCATA 128 at [20].

32 [2012] QCATA 128 at [17], [18].

33 (1997) 191 CLR 1 at 22.

34 Dawson and Gaudron JJ cited *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359, per Mason CJ and Gaudron J (with whom Deane J agreed), and at 372, per Brennan J; at 394, per Dawson and Toohey JJ; and at 406-407, per McHugh J.

discrimination of the basis of "lawful sexual activity", but that term was not defined and the list of attributes in s 7 did not then include the attributes now found in (m) and (n) ("gender identity" and "sexuality"). Those attributes, amongst others, were added to s 7 by s 14 of the *Discrimination Law Amendment Act* 2002 (Act No 74 of 2002), s 12 of which also introduced the definition of "lawful sexual activity". The Appeal Tribunal referred to the explanatory notes for that Amendment Act, which outlined the amendments, and to the Minister's second reading speech. The Minister commented that the "ground of 'sexuality' will cover 'heterosexuality, homosexuality and bisexuality'" and "will provide much clearer protection for the gay and lesbian community, which has previously had to rely on the attribute of 'lawful sexual activity' to make a complaint…" The Minister remarked that this had been found to be unsatisfactory "because it has been interpreted to mean that a person has to demonstrate actual activity to gain protection such that, for example, it would be lawful to discriminate against a celibate homosexual." This legislative history does not assist in the present construction exercise. On the face of it, the purpose of amending the Act to define "lawful sexual activity" was to prescribe the meaning of that expression as it is used in ss 7(l) and 28. Neither the explanatory notes nor the second reading speech suggests that the expression should not be given its defined meaning. Nor was there any indication that the expression "a person's status as a lawfully employed sex worker" was intended to extend so far beyond its ordinary meaning as to comprehend, not merely a particular status, but also the activity of engaging in prostitution.

[26] The Appeal Tribunal also referred to the provisions of the *Prostitution Laws Amendment Act* 1992, which followed a report by the Criminal Justice Commission which recommended that sole sex workers operating from their homes should remain lawful and that the operation of brothels should become lawful subject to a licensing regime.[35] The Appeal Tribunal observed that under the *Prostitution Laws Amendment Act* 1992 sole operator sex workers acted lawfully in providing prostitution services but that Act did not introduce a regulatory regime for prostitution. The Appeal Tribunal referred to the regulatory regime subsequently introduced by *Prostitution Act* 1999, and to the provisions of Pt 4 of the *Criminal Code* and summarised the relevant effects of these provisions as being that prostitution services offered by sole operators remain lawful and largely unregulated and that prostitution services offered in licensed brothels are regulated by the *Prostitution Act* 1999. The Appeal Tribunal concluded that upon the commencement of the prohibition of discrimination on the basis of lawful sexual activity in s 7 of the *Anti-Discrimination Act* 1991, the law was, and it remains, that a self-employed, individual sex worker not working in a brothel was acting lawfully in providing prostitution services. That conclusion also could not justify disregard of the definition of "lawful sexual activity" in the Act.

Application of s 10(1)

[27] Section 10 is akin to a deeming provision, the purpose of which is "to control the meaning and application of the other provisions of the Act…".[36] Accordingly, the statutory definition must be applied in order to decide whether, as GK contended, there was "[d]irect discrimination on the basis of an attribute" within the meaning of

---

35 [2012] QCATA 128 at [27]-[28].

36 See *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* [1998] HCA 39; (1998) 195 CLR 158 at 176 [44] (McHugh and Kirby JJ).

s 10(1) of the Act. In order to apply the test in s 10(1) it is necessary to identify the relevant characteristics of the comparator described in s 10(1) ("another person without the attribute"). It follows from the definition of "lawful sexual activity", that the comparator must be a person who does not have the status of a lawfully employed sex worker. The question under s 10(1) is whether GK was treated less favourably than another person who did not have that status would have been treated "in circumstances that are the same or not materially different". Those circumstances include "all of the objective features which surround the actual or intended treatment" of the person claiming to be discriminated against.[37]

[28] The Tribunal member held that the appropriate comparator was a person without the attribute of a lawfully employed sex worker "but with the same desire to obtain a room for the purpose of prostitution".[38] Dovedeen Pty Ltd and Mrs Hartley similarly contended in this application that a possibly appropriate comparator was a person who was "not a sex worker, but was also seeking to work as a sex worker in the hotel…".[39] A difficulty with this approach is that a person using a motel for prostitution might properly be regarded as a "lawfully employed sex worker". If so, to choose such a person as the comparator for the purpose of s 10(1) would be to disregard the requirement that the comparator not have the relevant attribute.

[29] The Appeal Tribunal adopted a different approach. It concluded, first, that the appropriate comparator was "a person who was seeking to make a booking or use the hotel accommodation for any lawful purpose, but not for prostitution, or lawful sexual activity within the meaning of section 7 of the Act"[40] and, secondly, that it was "implicit in the Respondents' conduct that had GK, or any other person sought accommodation for those purposes, they would have been seeking it without the relevant attribute and they would have provided that person with accommodation."[41] There are several difficulties with this analysis. The second conclusion flowed from what I have held to be the Appeal Tribunal's incorrect construction of the Act that the relevant attribute extended beyond "status as a lawfully employed sex worker" to engaging in prostitution in the motel room. Furthermore, the description of the comparator in the first conclusion as a person who sought to use the room "for any lawful purpose" involves reference to circumstances which are not "the same or not materially different" as required by s 10(1) because that description disregarded altogether the activities which GK proposed to conduct in the motel room. Finally in this respect, there was no finding or evidence to support the Appeal Tribunal's conclusion that, if GK or any other person had sought accommodation for any lawful purpose that would have been provided. The only directly relevant evidence on that topic to which the Court was referred was to the contrary; whether or not Mr Hartley correctly understood the effect of the s 152 of the *Liquor Act* 1992, an issue which it is not necessary to consider, his evidence suggests that he would not have countenanced Dovedeen Pty Ltd supplying accommodation to any person who intended to carry on any business in the room.

[30] I would accept the submission for the Attorney-General that the most appropriate comparator in the application of s 10(1) was a person who was not an employed sex

---

37 *Purvis v New South Wales* (2003) 217 CLR 92 at 161 [224] (Gummow, Hayne and Heydon JJ).
38 [2011] QCAT 509 at [76].
39 Transcript 19/03/2013 at 1-5.
40 [2012] QCATA 128 at [36].
41 [2012] QCATA 128 at [36].

worker who sought accommodation with a view to a series of separate sexual encounters with different people coming to and going from the person's motel room. There was no basis in the evidence for finding that Dovedeen Pty Ltd or Mrs Hartley would have provided accommodation to a person in those or similar circumstances or that they would have charged an amount for accommodation which differed from the amount that GK was charged.

Section 8

[31] Although the Appeal Tribunal referred to s 8 of the *Anti-Discrimination Act* 1991 it did not rely upon that provision in finding in favour of GK.[42] GK filed a notice of contention pursuant to which it was submitted on her behalf that the effect of s 8 was that the attribute of "lawful sexual activity" extended beyond the definition of that term to include the "characteristic" of "engaging in sex work lawfully" or "the performance of lawful sex work".[43] In support of this argument, reliance was placed upon a dictionary definition of "characteristic" as "a feature or quality typical of a person …".[44] The argument should not be accepted. The work done by a person in any remunerative occupation is not properly described as a "characteristic" or typical "feature or quality" of the person's status as a worker in that occupation; it is simply the activity done by the person to earn remuneration. Section 8 does not extend the reach of the Act in the way for which GK contended.

Disposition and proposed orders

[32] As I mentioned earlier, at the hearing of the application for leave to appeal the Attorney-General was given leave to appear for the purpose of assisting the Court by making submissions as to the proper construction of the term "lawful sexual activity" in s 7(l) of the *Anti-Discrimination Act* 1991. The Court also made the following orders at the hearing on applications by the applicants and the respondent respectively:

(a) Grant any necessary extension of time for the filing by the applicants of the application for leave to appeal.

(b) Grant any necessary extension of time for filing by the respondent of the notice of contention.

[33] This is an appropriate case for leave to appeal. For the reasons I have given, I would allow the appeal, set aside the orders made in the Appeal Tribunal, and order that the appeal to the Appeal Tribunal be dismissed. What costs orders, if any, should be made in relation to the proceedings in the Appeal Tribunal and in the Court were not dealt with in the parties' submissions. I would grant leave to the parties to make submissions about costs.

[34] The Application for Leave to Appeal and the Notice of Appeal named the appellants but identified the respondent only as "GK (as per orders of Qld. Civil Administrative Tribunal dated 20.12.11 and 31.07.12)." That form of title was used in the Court throughout, including by the parties in their written outlines of submissions and by the Court in listing the application for hearing. It was irregular. The orders made in the Tribunal which required the respondent to be identified by

---

42 See [2012] QCAT 128 at [35]-[36].

43 Transcript 19/03/2013 at 1-20.

44 Concise Oxford English Dictionary, 11th edition.

initials in the proceedings in the Tribunal[45] could not apply and they did not purport to apply in the Court of Appeal. In that respect, the *Uniform Civil Procedure Rules* 1999 provides, in r 747(1), that a Notice of Appeal must be in the approved form. The approved form requires the insertion of the names of the parties to the appeal.[46]

[35] The Court of Appeal has inherent power to make orders to the same effect as the orders made in the Tribunal and other orders concerning the non-publication of a party's name. At the hearing of the Application for Leave to Appeal, GK sought a non-publication order. Dovedeen Pty Ltd and Mrs Hartley did not oppose the application. GK's counsel noted that the orders for the use of initials only to identify GK were made in the Tribunal to protect the privacy of GK. He submitted, and counsel for Dovedeen Pty Ltd and Mrs Hartley accepted, that the Court might act on the submission without further evidence, that the publication of GK's identity would cause distress and embarrassment to her and to her young children.

[36] An extensive discussion of the relevant authorities and principles may be found in *J v L & A Services Pty Ltd & Ors*,[47] in which Fitzgerald P and Lee J summarised the principles to be applied in the Supreme Court, subject to any statutory provision to the contrary, in the following passage:

> "1. Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interests in the due administration of justice, freedom of speech, a free media and an open society require that court proceedings be open to the public and able to be reported and discussed publicly.
>
> 2. The public may be excluded and publicity prohibited when public access or publicity would frustrate the purpose of a court proceeding by preventing the effective enforcement of some substantive law and depriving the court's decision of practical utility. National security provides a further special, broadly analogous exception to the requirement of open justice because of its fundamental importance to the preservation of a democratic society based on the rule of law.
>
> 3. The permitted exceptions to the requirement of open justice are not based upon the premise that parties would be reasonably deterred from bringing court proceedings by an apprehension that public access or publicity would deprive the proceeding of practical utility, but upon the actual loss of utility which would occur, and the exceptions do not extend to proceedings which parties would be reasonably deterred from bringing if the utility of the proceedings would not be affected. Courts do not have access to the information needed to determine whether or not parties are reasonably deterred by openness or publicity from bringing particular kinds of proceedings; for example, sexual complaints. Legislatures are better equipped than courts to make informed decisions on such matters.

---

45 *Queensland Civil and Administrative Tribunal Act* 2009, ss 66, 124 and 125.

46 Notice of Appeal, Form 64, Version 4.

47 [1993] QCA 12.

> 4. No unnecessary restriction upon public access or publicity in respect of court proceedings is permissible.
> 5. Different degrees of restraint are permissible for different purposes. Although the categories tend to coalesce, they are broadly as follows:
>
> (a) Exclusion of the public or a substantive restraint upon publicity is not permissible unless abstractly essential to the practical utility of a proceeding; for example, prosecutions for blackmail or proceedings for the legitimate protection of confidential information: cf. *R v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society*.
>
> (b) A limited exclusion or restraint is permissible if necessary to ensure that a proceeding is fair; for example, witnesses may be required to absent themselves from hearings, parts of jury trials may take place in the absence of the jury and limited or temporary restrictions on publicity may be imposed during the course of jury proceedings.
>
> (c) An incidental, procedural restriction is permissible if necessary in the interests of a party or witness in a particular proceeding; for example, identities of witnesses or details of particular activities which are not directly material such as engaging in covert law enforcement operations or providing information to police may be suppressed." [48]

[37] Bearing in mind the strength of the public interest in open justice, the grounds of the application for a non-publication order are not overpowering but, on balance, I am not persuaded that it is now appropriate to make a direction of the Court's own motion requiring an amendment to the title of the proceedings to substitute GK's name for the initials by which she has been identified to date.

[38] I consider that the following orders are appropriate:

(a) Grant leave to appeal.
(b) Allow the appeal.
(c) Set aside the decision and orders made by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal on 31 July 2012.
(d) In lieu thereof, order that the appeal to the Appeal Tribunal against the decision of the Queensland Civil and Administrative Tribunal made on 25 October 2011 be dismissed.
(e) Leave to the parties to make submissions in accordance with paragraph 52 of Practice Direction No 2 of 2010 as to the costs of the proceedings in the Court of Appeal and of the appeal to the Appeal Tribunal in the Queensland Civil and Administrative Tribunal.

[39] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[40] **MARGARET WILSON J:** I agree with Fraser JA that leave to appeal should be granted, and the appeal should be allowed, and with the consequential orders his

---

[48] [1993] QCA 12 at p 33.

Honour proposes. I agree with his Honour's reasoning as to the proper construction and application of the relevant provisions of the *Anti-Discrimination Act* 1991 (Qld).

[41] However, I am troubled by the proposed disposition of the application for a non-publication order in the form of a pseudonym order.

[42] This Court was asked to make a non-publication order on the basis that publication of the respondent's identity would cause distress and embarrassment to her and to her young children.

[43] The respondent to the present appeal was the applicant before the Queensland Civil and Administrative Appeal Tribunal, where she obtained a non-publication order pursuant to s 66 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). She did not initiate the proceeding in this Court, although by commencing a proceeding in QCAT she necessarily took the risk that there would be an appeal to this Court against the Tribunal's determination.

[44] In *Russell v Russell*[49] Gibbs J observed –

> "The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'(*McPherson v McPherson*[50])."

[45] In *J v L & A Services Pty Ltd (No 2)*[51] the plaintiffs were a married couple with teenage children. Each of them was a scientist employed as a technician in connection with a pathology practice. They sued their employer and an associated group of medical practitioners for breach of contract of employment, negligence and breach of statutory duty. Their essential contention was that each acquired the HIV virus while taking and handling biological specimens and reagents in the course of their employment, or alternatively that one of them acquired the virus in that manner and the other through sexual intercourse within the marriage. They alleged that as a result of the virus each was at risk of contracting AIDS and each had suffered a loss of expectation of life.[52] Orders were made in the Trial Division having the effect that the identities of the plaintiffs should not be made public, and they should be referred to in the proceeding as "J". By majority, the Court of Appeal allowed an appeal from those orders and set them aside.

[46] As Fraser JA has said, the majority undertook an extensive discussion of relevant authorities and principles. After setting out the summary of principles quoted by his Honour, the majority continued –

> "6. It is the last category which gives rise to the most difficulty because of unresolved questions concerning the nature and ambit of the power. Support for a more liberal approach seems substantially confined to modern authority. Even so, information may not be withheld from the public merely to save a party or

---

49 (1976) 134 CLR 495 at 520.

50 [1936] AC 177 at 200.

51 [1995] 2 Qd R 10. The High Court granted special leave to appeal against this decision, but the appeal was discontinued.

52 Per Fitzgerald P and Lee J at 11, 12.

> witness from loss of privacy, embarrassment, distress, financial harm, or other 'collateral disadvantage', to use the expression adopted in *R v Tait*.[53] Additionally, when it is the interests of a party or a witness which is relied on as the basis for a proposed restraint, those considerations must be balanced against other factors, including the interests of others involved in the proceeding and others who may be affected. Open justice is non-discriminatory, whereas exceptions to the principle of open justice deny equal rights to the disputing litigants and provide a benefit to some litigants which is unavailable to members of the general public. Further, public scrutiny is a strong disincentive to false allegations and a powerful incentive to honest evidence, and publicity may attract the attention of persons with material information who are unaware of the proceeding. Again, as was pointed out by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*,[54] if information is suppressed 'proceedings would inevitably become the subject of rumours, misunderstandings, exaggerations and falsehoods ...': cf *Raybos Australia Pty Ltd v Jones*[55] at 59 per Kirby P, citing McPherson J in *Ex parte The Queensland Law Society Incorporated*.[56] A particularly unsatisfactory manifestation of this difficulty occurs when uncertainty as to the particular person concerned leads to speculation concerning other members of a relevant group. Finally, it is important to remember that what appears to be a more liberal approach involving the exercise of a discretionary power in the interests of an individual involves an erosion of fundamental rights and freedoms of the general public. The occasional misuse or abuse of these rights and freedoms or other disadvantages associated with public information and discussion, which is sometimes misinformed, together with any resultant harm are part of the cost of living in a free, democratic society. It is common for sensitive issues to be litigated and for information which is extremely personal or confidential to be disclosed. It is of obvious concern that such a paramount principle as the requirement of open justice should not be whittled away on a case by case basis according to individual judges' subjective views of the merits or demerits of the claims to privacy of individual litigants. It is also of concern that there should not be an expenditure of time, resources and costs on arguments that do not bear directly on the merits of disputes."[57]

[47] The majority described the potential harm to the respondents if their identity were made known in this way –

> "Apart from possible health consequences from stress associated with publicity, the request for suppression is based solely upon social disadvantages which might flow to the respondents and members of

---

53 (1979) 46 FLR 386 at 404.
54 (1986) 5 NSWLR 465 at 481.
55 (1985) 2 NSWLR 47 at 59.
56 [1984] 1 Qd R 166 at 171.
57 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 45.

> their family if their medical conditions became known. Neither stress and its potentially adverse effects nor the prospects of social harm differentiates the respondents from others who have legitimate cause to wish to avoid publicity. If any distinction is to be made, it must be because of matters associated with the respondents' particular disease."[58]

Despite their considerable sympathy for the plight of the respondents, the majority concluded that there could not be a principled suppression of their identities.

[48] One of the cases considered by the majority was *John Fairfax Group Pty Ltd v Local Court (NSW)*,[59] where the New South Wales Court of Appeal held (by majority) that a Local Court magistrate hearing committal proceedings had power to make pseudonym orders protecting the identity of an alleged victim of extortion. Mahoney JA (with whom Hope AJA agreed) accepted that pseudonym orders may be made only where it is "really necessary to secure the proper administration of justice."[60] Kirby P, who dissented in the outcome, expressed views to the same effect when he said –[61]

> "Not for a minute do I regard the adoption of the 'expedient' of a pseudonym as an unimportant derogation from the general principle that our courts are open and the parties and witnesses who appear in them are subject to be scrutinised there and reported upon, including in the public media. In *Attorney-General v Leveller Magazine Ltd*, in the House of Lords, Lord Scarman made it plain that the 'device' of making no mention of a name in open court was to be seen:[62]
>
> > ' … as a valuable and proper extension of the common law power to sit in private, and to be available when the court would have power at common law to sit in private but chooses not to do so.'
>
> …The use of pseudonym initials, beyond cases clearly allowed and in courts having the power to order them, is a significant departure from the norm. It would be undesirable that powerful individuals, substantial corporations or particular witnesses promised anonymity by the authorities, could secure such orders without authority of law and then only for very substantial reasons: cf Hunt J in *R v Savvas*.[63] In my opinion neither of these preconditions was present here. There was no authority of law. Nor were there substantial reasons."

[49] The circumstances in which the Court may exercise its discretion to make a non-publication order, including a pseudonym order, are not closed. However, the public interest in transparency in the administration of justice is so strong that, in the absence of some express legislative prescription, it is only where disclosure would actually deprive a proceeding of practical utility that a non-disclosure order should be made.[64] For example, orders have been made to protect national security,

---

58 Ibid at 46.
59 (1991) 26 NSWLR 131.
60 At 160 – 161.
61 At 150.
62 [1979] AC 440 at 471.
63 (1989) 43 A Crim R 331 at 339.
64 *Scott v Scott* [1913] AC 417.

to prevent the Court's proceedings being disrupted by rioters, to protect a secret process which is the subject of the litigation, and in cases of blackmail and extortion.

[50] In the present case, the respondent pursued her occupation as a sex worker lawfully. While I appreciate that there are people, perhaps many, in the community who disapprove of any form of prostitution on moral, ethical and even religious grounds, and that there is some stigma associated with its practice, there is no reason to conclude that a pseudonym order is really necessary to secure the proper administration of justice.

[51] Accordingly, I would refuse the application for a non-disclosure order, and would direct the Registrar to amend the title of the proceeding to substitute the respondent's name for the initials by which she has been identified to date.