SUPREME COURT OF QUEENSLAND

CITATION:	*Lyons v State of Queensland* [2015] QCA 159
PARTIES:	**GAYE PRUDENCE LYONS** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 11013 of 2014 QCAT Appeal No 8 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2014] QCATA 302
DELIVERED ON:	28 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2015
JUDGES:	Holmes and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION – INDIRECT DISCRIMINATION – where the applicant, who was deaf, was excluded from jury service by a Deputy Registrar – where the applicant made a complaint of indirect discrimination – where the applicant seeks leave to appeal a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal – where the Tribunal Member found, and the Appeal Tribunal agreed, that the Deputy Registrar had not imposed a term on the applicant's participation as a juror – where the applicant argues that the Appeal Tribunal erred in its construction and application of s 11 of the *Anti-Discrimination Act* 1991 (Qld) by failing to conclude that the respondent had imposed a term that the applicant be able to communicate by conventional speech in the jury room – where the applicant further argues that the Appeal Tribunal erred by failing to consider an alternative term that the applicant be able to participate in jury activities without the assistance of an Auslan interpreter – where the applicant conceded that there was no real difference between the terms – whether the Appeal Tribunal erred – whether leave to appeal should be granted

HUMAN RIGHTS – DISCRIMINATION – DIRECT DISCRIMINATION – where the applicant, who was deaf, was excluded from jury service by a Deputy Registrar – where the applicant made a complaint of direct discrimination – where the applicant seeks leave to appeal a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal – where the Appeal Tribunal concluded that the reason for the Deputy Registrar's exclusion of the applicant was a consideration of all of the circumstances and the effect of the interpretation of the *Jury Act* 1995 (Qld) with respect to the impermissibility of allowing an additional person in the jury room – where the applicant argues that the Appeal Tribunal erred in concluding that her impairment was not the reason for her exclusion, rather than considering whether it was a substantial reason for it – where the applicant argues that her impairment was inextricably linked to her requirement of an Auslan interpreter – whether the Appeal Tribunal erred – whether leave to appeal should be granted

HUMAN RIGHTS – DISCRIMINATION – DIRECT DISCRIMINATION – where the applicant, who was deaf, was excluded from jury service by the Deputy Registrar – where the applicant made a complaint of direct discrimination – where the applicant seeks leave to appeal a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal – where the Tribunal Member found that the appropriate comparator for the purpose of s 10(1) *Anti-Discrimination Act* 1991 (Qld) was a person without the applicant's disability who requested the presence of another person in the jury room – where the applicant argues that the Tribunal Member failed to exclude from consideration the need for an interpreter, which amounted to taking into account the fact that the applicant required special services, contrary to s10(5) *Anti-Discrimination Act* 1991 (Qld) – whether the Appeal Tribunal erred – whether leave to appeal should be granted

Anti-Discrimination Act 1991 (Qld), s 6, s 9, s 10, s 11, s 46, s 101
Criminal Code (Qld), s 95
Disability Discrimination Act 1992 (Cth), s 5
Jury Act 1995 (Qld), s 4(3)(l), s 20, s 50, s 54
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150

JM v QFG [2000] 1 Qd R 373; [1998] QCA 228, cited
Lyons v State of Queensland (No 2) [2013] QCAT 731, related
Lyons v State of Queensland [2014] QCATA 302, related
New South Wales v Amery (2006) 230 CLR 174; [2006] HCA 14, cited
Purvis v New South Wales (2003) 217 CLR 92; [2003] HCA 62, applied
Re: the Jury Act 1995 and an application by the Sheriff of Queensland [2014] QSC 113, considered

Waters v Public Transport Corporation (1991) 173 CLR 349; [1991] HCA 49, considered

COUNSEL: D P O'Gorman SC, with B E Fogarty, for the applicant
K Mellifont QC, with A D Scott, for the respondent

SOLICITORS: Australian Centre for Disability Law for the applicant
Crown Law for the respondent

[1] **HOLMES JA:** The applicant seeks leave to appeal against a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal dismissing her appeal against the order of a Member of the Tribunal. She had made a complaint of indirect and direct discrimination under sections 10 and 11 of the *Anti-Discrimination Act* 1991, which the Member had dismissed.

Background

[2] A statement of agreed facts was filed in the Tribunal. According to it, the applicant has a total loss of hearing which makes her unable to communicate with others through spoken language. Her primary means of communication is Australian Sign Language (Auslan); she requires an interpreter when communicating with people who cannot use Auslan. In January 2012, the applicant was summonsed for jury service at Ipswich. She alerted the Deputy Registrar of the Ipswich Court, Ms Britton, to the fact she was deaf and would need the services of two Auslan interpreters. In response, the Deputy Registrar advised that it was not possible for the applicant to perform jury service because there was no provision in the *Jury Act* 1995 to swear in an interpreter for a juror, and no person other than jurors and bailiff could be present in the jury room while deliberations were taking place.

[3] In response to a later email, the Deputy Registrar identified s 4(3)(l) as the relevant provision of the *Jury Act*. It provides:

> "4 Qualification to serve as juror
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> ..
>
> (3) The following persons are not eligible for jury service –
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> …
>
> (l) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;…"

[4] Giving evidence in the Tribunal, Ms Britton confirmed that her reason for excusing the applicant from jury service was as she had previously indicated: that is, the lack of provision for swearing in an interpreter, and the impossibility of another person, other than jurors and bailiff, being present in the jury room while deliberations were under way.

Application for leave to appeal, proposed appeal grounds and notice of contention

[5] Section 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 provides for an appeal against a decision of the Appeal Tribunal to this Court on a question of law, by leave. The grounds of the proposed appeal were that the Appeal Tribunal had

erred in its construction of section 11 of the *Anti-Discrimination Act* by failing to conclude that terms constituting indirect discrimination had been imposed on the applicant; that in considering direct discrimination, it had erred by failing to consider whether the applicant's impairment was a substantial reason for her treatment; that it had erred in taking account of the applicant's need for the assistance of an Auslan interpreter in determining whether she had been treated less favourably; and that it had erred in concluding that the Deputy Registrar had correctly construed and applied the *Jury Act*.

[6] The respondent opposes the granting of leave to appeal. It has filed a notice of contention arguing, in the event that leave is given, that the Appeal Tribunal should have held that if the conduct in question were unlawful, the *Anti-Discrimination Act* was to be read as impliedly repealed by the *Jury Act* to the extent that the former Act made the conduct unlawful.

[7] Whether leave to appeal should be granted requires consideration of whether the interests of justice warrant it; which in turn requires consideration of whether the proposed grounds of appeal have reasonable prospects of success. In my view, whether the applicant as a deaf person was discriminated against, contrary to the *Anti-Discrimination Act*, in being ruled ineligible for the important civic responsibility of jury service is a matter of significant public interest. However, I have reached a view of the merits of the prospective appeal grounds which has led me to conclude that leave to appeal should not be granted.

The relevant Anti-Discrimination Act provisions

[8] Section 6(1) of the *Anti-Discrimination Act* identifies one of its purposes:

> "to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation."

Section 7 prohibits discrimination on the basis of certain attributes, which include "impairment", defined in the Schedule to the Act as including the loss of a bodily function. (The parties formally agreed in the Tribunal proceedings that the applicant's deafness amounted to an impairment.) Section 8 of the Act provides that discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of a characteristic that a person with that attribute generally has; it was agreed here that the need to use Auslan for communication was such a characteristic. Section 9 prohibits both direct and indirect discrimination.

[9] Section 10 of the *Anti-Discrimination Act*, which deals with direct discrimination, provides (with examples omitted):

> "10 Meaning of *direct discrimination*
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> (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.
>
> (2) It is not necessary that the person who discriminates considers the treatment is less favourable.
>
> (3) The person's motive for discriminating is irrelevant.

> (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.
>
> (5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant."

The parties agreed that Auslan interpretation was a "special service or facility" within the meaning of s 10(5).

[10] Section 11 of the *Anti-Discrimination Act* is concerned with indirect discrimination. It is as follows (again excluding examples):

> "11 Meaning of *indirect discrimination*
>
> (1) *Indirect discrimination* on the basis of an attribute happens if a person imposes, or proposes to impose, a term—
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> (a) with which a person with an attribute does not or is not able to comply; and
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> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable.
>
> (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example–
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> (a) the consequences of failure to comply with the term; and
>
> (b) the cost of alternative terms; and
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> (c) the financial circumstances of the person who imposes, or proposes to impose, the term.
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> (3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.
>
> (4) In this section–
>
> term includes condition, requirement or practice, whether or not written."

[11] The applicant's case before the Tribunal was that the Deputy Registrar had discriminated against her on the basis of her impairment in the provision of services, contrary to ss 9 and 46 of the *Anti-Discrimination Act*, or alternatively in the administration of a State law (the *Jury Act*) and program (the administration of the jury system) contrary to ss 9 and 101 of the Act. The respondent had conceded the applicability of s 101 of the Act, which is set out here:

> "101 Discrimination in administration of State laws and programs area

A person who—

(a) performs any function or exercises any power under State law or for the purposes of a State Government program; or

(b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in—

(c) the performance of the function; or

(d) the exercise of the power; or

(e) the carrying out of the responsibility."

The Tribunal Member at first instance found it unnecessary to resolve whether s 46 was applicable, but senior counsel for the applicant here properly acknowledged the difficulty of arguing that the determination of eligibility for jury service somehow involved the supply of a service under s 46 of the Act.

The findings of the Tribunal Member

[12] The applicant contended before the Tribunal that the Deputy Registrar had imposed a term on her participation as a juror, which was that she be "able to communicate by conventional speech in the jury room." The Tribunal Member found[1] that the Deputy Registrar had not imposed any such term; there was no evidence that she had informed the applicant to that effect. It was not the fact that the applicant required an interpreter which caused the Deputy Registrar to exclude her, but the fact that the individual performing that role would have to be present in the jury room. Because he did not find any term of the kind had been imposed, it was unnecessary to decide whether it would have been unreasonable. Had it been, he would not have considered it reasonable.

[13] The appropriate comparator for the purposes of applying s 10 of the Act was a person without the applicant's disability who requested the presence of another person in the jury room. An example was a person whose grasp of English was not so poor as to exclude him or her from jury service but who sought the assistance of an interpreter because of some limitations in understanding the language. The Member concluded that the basis for the Deputy Registrar's decision was not the attribute of disability, although he considered that she was wrong in her analysis of the *Jury Act* and its application to the applicant. As to the latter, firstly, in his view, s 4(3)(l) referred to whether the nature and extent of a disability made a person unable effectively to perform the functions of a juror, not to secondary considerations such as whether some other statutory provision made it unlawful for the person to sit on a jury. Thus, he did not consider that s 4(3)(l) was concerned with incapacity through the need for the presence of an interpreter. Secondly, the Member did not consider that the presence of an interpreter in the jury room would necessarily be inconsistent with any provision of the *Jury Act*. Nonetheless, the Deputy Registrar's reasoning was based on an interpretation of what was permissible at law, involving consideration of whether an interpreter would be able to take an oath, and whether the interpreter could properly participate in the jury's deliberative processes; her decision to exclude was not on the basis of a relevant attribute. The complaint under s 10 was not made out.

[14] The respondent submitted that if there were any unlawful discrimination, s 4(3)(l) of the *Jury Act* impliedly repealed the *Anti-Discrimination Act* to the extent of any

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[1] *Lyons v State of Queensland (No 2)* [2013] QCAT 731.

inconsistency. The Member rejected that argument, because on his construction, s 4(3)(l) was not concerned with what he termed "secondary aspects of disability" such as the need for an interpreter. The powers being exercised by the Deputy Registrar were capable of being applied in a way which could operate harmoniously with the provisions of the *Anti-Discrimination Act*.

The Appeal Tribunal's decision

[15] The applicant appealed the Member's decision to the Appeal Tribunal. While she had a right of appeal in relation to questions of law arising from it, she could appeal only with leave on questions of fact or mixed law and fact.[2]

[16] The Appeal Tribunal[3] reviewed a ruling of Douglas J in *Re: the Jury Act 1995 and an application by the Sheriff of Queensland*,[4] given after the Tribunal Member gave his decision. Douglas J had decided, applying s 4(3)(l) of the *Jury Act*, that an individual who needed the assistance of an Auslan interpreter was ineligible for jury service. The Appeal Tribunal considered that the ruling provided a complete answer to the applicant's claim, but because the Member had proceeded on different bases, it went on to consider each of the appeal grounds relating to his reasoning, and found that none was made out.

[17] Those grounds, taken directly from the applicant's written submissions, were set out in the Appeal Tribunal's decision as follows:

> "(a) Determining that the impugned conduct was not based on the [appellant's] impairment (that is, causation);
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> (b) Failing to treat as irrelevant the applicant's (sic) need for special services and facilities;
>
> (c) Not determining that the [appellant's] impairment was a substantial reason for the impugned conduct;
>
> (d) Failing to treat the Deputy Registrar's motive for engaging in the impugned conduct as irrelevant;
>
> (e) Its [formulation] of the "*comparator*";
>
> (f) Formulating the "*term*" imposed upon the appellant in applying section 11 of the ADA; and
>
> (g) Holding that it was bound by the precise formulation of the term relied upon by the appellant."[5]

[18] It is convenient to consider the Appeal Tribunal's reasons in conjunction with the proposed grounds of appeal to this court and my conclusions on each.

Indirect discrimination – alleged error in construction and application of s 11

[19] The applicant's first proposed appeal ground was that the Appeal Tribunal had erred in its construction and application of s 11 by failing to conclude that the respondent had imposed either or both of: the term which the applicant propounded in the

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2 Section 142(3)(b) *Queensland Civil and Administrative Tribunal Act* 2009.
3 *Lyons v State of Queensland* [2014] QCATA 302.
4 [2014] QSC 113.
5 *Lyons v State of Queensland* [2014] QCATA 302 at [4].

Tribunal at first instance and a term newly formulated for the purposes of the appeal to the Appeal Tribunal.

[20] In the Appeal Tribunal, the applicant argued (with reference to (f) and (g) of the grounds relevant there) that the Tribunal Member erred in regarding himself as bound by the precise term contended for before him: that the appellant be able to communicate by conventional speech in the jury room. (For brevity's sake, I will refer to that term as the "communication term"). He should have formulated an appropriate term, that the applicant "as a potential juror, be able to participate in jury activities without the assistance of an Auslan interpreter" (which I will refer to as the "participation term").

[21] Reliance was placed on this observation of Callinan J in *New South Wales v Amery*:[6]

> "The Tribunal and the courts are not bound by an applicant's formulation of a condition or requirement. It is their duty to ascertain the actual position, including whether an (alleged) perpetrator has truly sought to impose, or permit indirectly, the imposition of a requirement or a condition which is discriminatory, and not reasonable within the meaning of the Act."

[22] The Appeal Tribunal did not consider that the Tribunal Member had done anything contrary to that observation. He had found that the basis of the Deputy Registrar's decision was that the applicant was not as a matter of law entitled to serve as a juror, not the imposition of any term, requirement or condition. The Appeal Tribunal could only address the suggested alternative term on the basis of that finding of fact; with which, its members observed in parenthesis, they agreed. There was, therefore, no basis for accepting any alternative term to that considered by the Tribunal Member. The Deputy Registrar having acted to apply the statute, it was irrelevant to speak of the imposition or reasonableness of a term.

[23] In written submissions in this court, the applicant submitted that in determining whether a term of the kind contended for had been imposed on the applicant, it was necessary to consider whether the Deputy Registrar by her conduct had imposed "any form of qualification or prerequisite" (an expression taken from the judgment of Dawson and Toohey JJ in *Waters v Public Transport Corporation*[7]) as a condition precedent to the applicant's obtaining a relevant status or benefit. It was unnecessary to show that there was any positive act or statement by the Deputy Registrar; a term could be implicit in conduct.[8] The Deputy Registrar's intention or motive was irrelevant.[9] The applicant would have been permitted to participate in the jury process if she were able to communicate with others using conventional speech.

[24] The written submissions, while setting out some principles and asserting that a different result should have been reached, did not explain how it was that the Appeal Tribunal, in the process of considering whether the Tribunal Member should have formulated a different term, had erred in its construction or application of s 11. Senior counsel for the applicant, pressed on the subject here, suggested that the Appeal Tribunal had erred in failing to consider whether the communication term had been imposed, having focused its attention on the suggested alternative, the participation

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6 (2006) 230 CLR 174 at [208].
7 (1991) 173 CLR 349 at 393.
8 *Waters v Public Transport Corporation* at 360.
9 *Waters v Public Transport Corporation* at 359.

term; while the finding that no term had been imposed was not open on the evidence. Notwithstanding the former contention and the ground of appeal advanced in the Appeal Tribunal, counsel ultimately conceded that there was no real difference between the participation and the communication terms; they were simply different ways of articulating the same thing. He qualified that concession by saying that the participation term might be more "neutral"; but that qualification did nothing to advance his argument.

[25] The Appeal Tribunal, having identified both terms contended for, noted that the Tribunal Member's finding (with which it agreed) was that no term was imposed. It concluded, therefore, that there was no error in his not considering an alternative term. There was no reason why it should then for itself have embarked on any further consideration of the original communication term. And since the appeal to the Appeal Tribunal (in respect of indirect discrimination) was based solely on the Member's failure to formulate the participation term, it is difficult to see how the applicant can now advance an argument of error of law in what she contends was its finding that no term was imposed. Indeed, I doubt that there was such a finding; the Appeal Tribunal merely expressed its agreement with the Tribunal Member's finding to that effect, in an observation incidental to its resolution of the appeal grounds before it.

[26] However, assuming for the purposes of the applicant's argument that the Appeal Tribunal did make a finding of fact that no term was imposed, such a finding seems to me well open on the evidence. The Deputy Registrar was performing her functions in connection with the applicant's eligibility for, rather than performance of, jury service, since the latter had not reached the stage of actual service as a juror. It was in that context that any prospective term or condition fell to be considered. But it was not the Deputy Registrar's role to determine the conditions for the applicant's eligibility for jury service; it was the statute which set those conditions. The Deputy Registrar determined as a question of fact that the statutory conditions for eligibility were not met; or to put it another way, that the statutory prescription for ineligibility was met. She thought that to be the case because the applicant was deaf and because on her understanding of the *Jury Act* an interpreter could not be present in the jury room, nor take the necessary oath of secrecy. It does not matter for the purposes of this argument whether the Deputy Registrar's apprehension that the applicant's deafness would make her incapable of effectively performing the functions of a juror was right or wrong.

[27] The conclusion that the Deputy Registrar did nothing amounting to the imposition of a term or condition, as opposed to the application of an existing statutory requirement, was plainly available. There is no real prospect of the applicant's demonstrating error in the Appeal Tribunal's conclusion that it was irrelevant to speak of the imposition of a term.

Direct discrimination – alleged error in failing to consider whether impairment was "a substantial reason"

[28] In the Appeal Tribunal, the applicant appealed (ground (c)) against the Tribunal Member's failure to conclude that her impairment was a "substantial reason" for the Deputy Registrar's conduct. That ground, which on its face involved purely a question of fact, was dealt with fairly briefly by the Appeal Tribunal:

> "**Not determining that the appellant's impairment was a substantial reason for the impugned conduct**
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> … It was a consideration of all of the circumstances and the effect of the interpretation of the *Jury Act* with respect to the impermissibility

> of an additional person in the jury room [which] was the reason for the applicant being excused. That conclusion was open to the learned Member, and it is not correct to say, when considering an appropriate comparator, that the sole reason for her exclusion was her hearing impairment."[10]

[29] The appeal ground here was that the Appeal Tribunal had erred in concluding that the applicant's impairment was not the reason for the Deputy Registrar's conduct, rather than considering whether it was at least a substantial reason for it. The applicant argued that both the Appeal Tribunal and the Tribunal Member had wrongly sought to determine the reason for the Deputy Registrar's exclusion of the applicant, rather than considering whether her impairment was a substantial reason for that exclusion. Neither the Appeal Tribunal nor the Tribunal Member had found the only reason for the applicant's exclusion was the belief that the *Jury Act* precluded her performance of jury service. In the absence of such a finding, the conclusion that her impairment was not also a substantial reason could not be drawn. To fail to apply s 10(4), which directs attention to whether the attribute in question is a substantial reason for less favourable treatment, was an error of law.

[30] The applicant also contended that her requirement of an Auslan interpreter was inextricably linked to her being deaf. To isolate her impairment from the Deputy Registrar's conclusion that she could not serve on a jury because an interpreter could not be provided to her consistently with the *Jury Act* was to frustrate the purpose of the *Anti-Discrimination Act*. It was suggested that this amounted to a failure to heed comments by Dawson and Toohey JJ in *Waters v Public Transport Corporation*.

[31] In *Waters*, the respondent's corporation had withdrawn conductors from its trams, and the question was whether that amounted to a requirement that passengers travel without the assistance of a conductor. The respondent contended that it provided a service of driver-only trams and no relevant requirement was imposed with respect to its use. Given the legislation ought to be liberally construed, Dawson and Toohey JJ did not consider

> "that the respondent can evade the [legislation's implications] by defining the service which it provides so as to incorporate as part of that service what would otherwise be a requirement or condition of the provision of that service."[11]

Their Honours qualified that statement somewhat by saying that the respondent ought not to be allowed to do so where it was continuing to provide a service with alterations which could be characterised as new requirements. In any event, they remarked, the description of the service and the characterisation of the requirements on which it was provided were questions of fact to be determined by the Equal Opportunity Board.

[32] I do not think that the passage from *Waters*, which was concerned with indirect discrimination, can serve the applicant as anything more than a distant guide to the correct approach to the legislation. There was no service being provided here, nor an argument that it was inappropriately being conflated with a relevant requirement. The applicant's argument, rather, is against segregating the impairment from its consequences. But in the context of direct discrimination, the question is whether less favourable treatment occurred on the basis of an attribute (in this case deafness

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10 *Lyons v State of Queensland* [2014] QCATA 302 at [41].

11 *Waters v Public Transport Corporation* at 394.

and the need to use Auslan to communicate). To identify the factor which led to the applicant's falling within the application of s 4(3)(l) of the *Jury Act*, as the Deputy Registrar saw it, is not to identify the "true basis" of the latter's decision.[12] As was made clear in *JM v QFG and TK*,[13] it would be a misapplication of s 10 to treat an attribute which merely gives rise to the circumstances in which particular treatment occurs as being the basis for that treatment.

[33] In my view, it is plain from the heading of the relevant paragraph of its decision ("Not determining that the appellant's impairment was a substantial reason for the impugned conduct") that the Appeal Tribunal was under no misapprehension as to the appropriate test under s 10(4). It was not a situation in which more than one reason for the Deputy Registrar's conduct had been identified either at first instance or in the Appeal Tribunal. The Tribunal Member had expressly found that the Deputy Registrar's conduct was not based on the applicant's deafness or her need to use Auslan as a means of communication.[14] That was a finding of fact with which the Appeal Tribunal saw no reason to disagree, and it follows from it that the question of the impairment's being a "substantial reason" for less favourable treatment did not arise.

Direct discrimination – alleged error in taking the requirement for a special service into account in determining the "comparator"

[34] The Appeal Tribunal rejected a submission (relating to grounds (b) and (e) of the appeal to it) that by having regard to the applicant's need for an Auslan interpreter in the jury room, the Tribunal Member had disregarded s 10(5). (That sub-section makes irrelevant the need for special services or facilities of an individual with an impairment in considering whether he or she has been treated less favourably than another person would be treated in similar circumstances.) The applicant's contention, it concluded, would require dealing with the case as though it entailed a set of circumstances which were "wholly hypothetical" (an expression taken from the judgment of Gummow, Hayne and Heydon JJ in *Purvis v New South Wales*[15]), in which there was no aspect of disability.

[35] Here, the applicant argued that the Tribunal Member (and presumably also the Appeal Tribunal) erred in formulating the characteristics of the "comparator" for the purpose of s 10(1) by failing to exclude from consideration the need for an interpreter. That amounted to taking into account, contrary to s 10(5), the fact that the applicant would require special services. Consequently, in determining whether direct discrimination had occurred, it was not permissible to take into account the fact that the Deputy Registrar's conduct might have been caused by the requirement that a non-juror not be present in the jury room. The appropriate comparator was a person without the applicant's disability who wished to perform jury service. The applicant sought to distinguish the decision of the High Court in *Purvis v New South Wales*.

[36] In *Purvis*, the High Court was considering s 5 of the *Disability Discrimination Act* 1992 (Cth) in connection with a complaint by the father of an intellectually disabled boy excluded from school for violent behaviour. Section 5(1) of the *Disability Discrimination Act*, like s 10(1), provided that discrimination occurred where the discriminator treated or proposed to treat the complainant less favourably than he or

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12 Cf *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 per Deane and Gaudron JJ at 176.
13 [1998] QCA 228.
14 *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [170].
15 (2003) 217 CLR 92 at 160.

she would a person without the disability "in circumstances that are the same or are not materially different". Section 5(2) provided that circumstances were

> "not materially different because of the fact that different accommodation or services may be required by the person with the disability".

[37] The appellant in *Purvis* argued that the appropriate comparator was a pupil without the disability of his disturbed behaviour. That was because disability was defined as requiring reference both to the disorder and the resulting behaviour, and because it was necessary to exclude from the circumstances which were the same, or not materially different, all the circumstances constituting the disability. Gummow, Hayne and Heydon JJ, who were part of the majority, made these observations:

> "It may readily be accepted that the necessary comparison to make is with the treatment of a person without the relevant disability. Section 5(1) makes that plain. It does not follow, however, that the "circumstances" to be considered are to be identified in the way the appellant contended. Indeed, to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the Act. Section 5(2) provides that the relevant circumstances are not shown to be materially different by showing that the disabled person has special needs. The appellant's contention, however, went further than that. It sought to refer to a set of circumstances that were wholly hypothetical – circumstances in which no aspect of the disability intrudes. That is not what the Act requires.
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> ….
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> The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator'. It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability."[16]

The question, the majority held, was whether in the same circumstances – including the violent behaviour – a pupil without the boy's disability would have been treated in the same way.

[38] The applicant argued that *Purvis* could be distinguished on the basis that s 10(5) referred to the fact that special services might be required as "irrelevant" in determining whether the circumstances were "materially different", whereas in *Purvis*, s 5(2) of the *Disability Discrimination Act* merely provided that the need for services did not render the circumstances "materially different". That does not seem to me a compelling basis for distinguishing *Purvis*; I would read s 5(2) as having precisely the same effect as s 10(5), of rendering the requirement for services irrelevant.

[39] There can be no doubt that the appropriate comparator is a person without the applicant's attribute of deafness or need to communicate through Auslan. But to posit a comparator with no further qualification than a desire to perform jury service is meaningless; it is to disregard the circumstances in which the relevant treatment of the applicant occurred. Here the circumstances in which the Deputy Registrar made

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16 *Purvis v New South Wales* at 160-161.

her decision were that she was required to apply a law which, at least in her view, precluded the presence of an outsider in the jury room. That was not a question of the applicant's needing a special service: the Registrar did not exclude her because of her need for the assistance of an interpreter but because of the perceived impossibility of an interpreter, as a person extraneous to the jury, being present in the jury room. The Tribunal Member appropriately had regard to that consideration as part of the circumstances of the relevant treatment in formulating the comparator of a person with hearing seeking the assistance of another in the jury room.

Alleged error by the Appeal Tribunal in concluding that the Deputy Registrar correctly applied the Jury Act

[40] The final proposed appeal ground was that the Appeal Tribunal had erred in concluding that the Deputy Registrar correctly construed and applied the *Jury Act*. It is not strictly necessary to reach a view on this proposed ground, because in any event the Appeal Tribunal dealt with the appeal before it on the grounds there advanced, and it has not been shown to have committed any error of law in doing so. And if the Deputy Registrar's conduct was, on the findings of the Tribunal Member, not discriminatory within the meaning of s 10 or s 11 of the *Anti-Discrimination Act*, it does not matter whether her understanding of the effect of the *Jury Act* was correct. However, for completeness, I will express some views as to the ground's prospects of success.

[41] In its decision, the Appeal Tribunal set out at some length the salient points of Douglas J's reasoning in *Re: the Jury Act 1995*. Douglas J identified the problem posed by s 54 of the *Jury Act*, which prohibits a person from communicating, without the judge's leave, with jurors while they are kept together. His Honour expressed doubt that the discretion to give leave would extend to permitting an interpreter to sit in a jury room. There was the further difficulty that no power existed to require an interpreter for that purpose to swear an oath, or undertake by affirmation, to maintain the secrecy of the jury's deliberations. Section 95 of the *Criminal Code* made it an offence to administer an oath, or take an affirmation, without authority.

[42] Douglas J concluded that it would not be appropriate to permit an interpreter to be present in the jury room absent specific legislative provision. The prospective juror in the case before him was able to lip read, but she acknowledged that she might miss parts of conversations. There was, his Honour concluded, a risk that without an interpreter she would not be able to participate fully in communications in the jury room. He found, therefore, that the person in question was incapable of effectively performing the functions of a juror. If he were wrong about that, he said, he would have exercised his discretion under s 20 of the *Jury Act* to excuse her in the interests of ensuring a fair trial.

[43] The Appeal Tribunal described Douglas J's decision as of "great persuasive value". Its members saw no reason to depart from it; indeed they were of the same view. The ruling, in their view, supported the Deputy Registrar's approach.

[44] There were two aspects to the applicant's submissions. First, she contended that although s 4(3)(l) of the *Jury Act* requires an individual assessment of the potential juror, his or her disability and his or her capacity to perform jury service, the Appeal Tribunal had accepted without evidence that she was incapable of effectively performing the duties of a juror within the meaning of s 4(3)(l). It had erroneously proceeded on

the basis that the incapacity of the deaf person whom *Re: the Jury Act 1995* concerned could be attributed to her. To apply the characteristics of one deaf person to another offended against the purpose of the *Anti-Discrimination Act* as set out in s 6(1).

[45] Secondly, the applicant argued that the *Jury Act* contained no express provision prohibiting the presence of another person in the jury room, while s 54(1) of the Act contemplated that the trial judge could give leave for such communication. The Tribunal Member had been correct, therefore, in concluding that nothing in the *Jury Act* constituted a complete prohibition on there being a person other than jurors in the jury room, and the Appeal Tribunal was wrong to reach a different conclusion.

[46] I do not consider that the Appeal Tribunal made any finding of fact as to the applicant's capacity or otherwise to perform jury service. Rather, it concluded that Douglas J's interpretation of the *Jury Act*, which accorded with the Deputy Registrar's approach, was correct: that there was no power to require an interpreter to swear an oath or to let him or her be present in the jury room. That did not amount to attributing to the applicant the incapacity or characteristics of the deaf person with whom Douglas J was dealing. It was a conclusion that the Deputy Registrar was right in applying the same view of the law as Douglas J's to another individual with the same attribute of deafness and the same characteristic of needing the assistance of an Auslan interpreter.

[47] It is not necessary for me to reach a concluded view on the correctness of Douglas J's ruling, the Appeal Tribunal's adoption of it, or the Deputy Registrar's approach. However, assuming (but not accepting) that the applicant may be correct as to a trial judge's power to give leave for an interpreter to communicate with jurors, the difficulties in having a person other than a juror present during deliberations in the jury room are not necessarily resolved. Section 50 of the *Jury Act* requires that the members of the jury be sworn not to disclose anything about their deliberations "except as allowed or required by law". On the present state of the legislation, it is difficult to see how jury members could discuss the case in the presence of an interpreter without breaking their oath, or, indeed, how a trial judge could properly give leave for that to occur. Consequently, I doubt the applicant's argument on this point had real prospects of success.

Conclusion

[48] It is unnecessary to consider the respondent's notice of contention. For the reasons given, I do not consider that the applicant's proposed appeal has sufficient merit to warrant the granting of leave to appeal. I would, accordingly, refuse the application for leave to appeal.

[49] **GOTTERSON JA:** I agree with the order refusing leave to appeal proposed by Holmes JA and with her Honour's reasons for it.

[50] **MULLINS J:** I agree with Holmes JA.