

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Middleton v Mirvac Real Estate Pty Ltd* [2020] QCAT
289

PARTIES: **ANDREW MIDDLETON**
(applicant)

v

MIRVAC REAL ESTATE PTY LTD
(respondent)

APPLICATION NO/S: ADL019-19

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 29 July 2020

HEARING DATE: 17 July 2020

HEARD AT: Brisbane

DECISION OF: Member Kanowski

ORDERS: **1. Andrew Middleton's complaint of contravention of the *Anti-Discrimination Act 1991 (Qld)* is dismissed.**
2. The application for miscellaneous matters filed by Andrew Middleton on 16 July 2020 is refused.

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION
LEGISLATION – INDIRECT DISCRIMINATION –
where complainant says he has post-traumatic stress
disorder associated with fear of dogs – where shopping
centre permits companion dogs to enter – whether
complainant has established attribute of impairment –
whether unlawful discrimination

Anti-Discrimination Act 1991 (Qld), s 7(h), s 11

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: JKR Lawyers

REASONS FOR DECISION

Introduction

- [1] Mr Middleton is a 59 year-old man who says he has a psychological condition involving fear of dogs, with associated physical health conditions. The respondent, ‘Mirvac’, owns Toombul Shopping Centre. Mirvac allows ‘companion dogs’ into the shopping centre. This practice was introduced after Petbarn and Greencross Vets moved into the centre, in shared premises, with internal customer entry from the shopping mall. The practice also facilitates people bringing dogs into the Bunnings store in the centre, which also has only an internal customer entrance.
- [2] Mr Middleton contends that Mirvac is unlawfully discriminating against him on the basis of impairment: in allowing companion dogs into the centre, Mirvac precludes him from going there.
- [3] Mirvac does not expressly exclude people with Mr Middleton’s contended impairment, and it is presumably for that reason that he advances his complaint as one of indirect, rather than direct, discrimination.
- [4] Mirvac contends that it has not engaged in unlawful discrimination.

Legal framework

- [5] The *Anti-Discrimination Act* 1991 (Qld) (*‘Anti-Discrimination Act’*) prohibits direct and indirect discrimination on the basis of certain attributes, in certain areas of activity, subject to any applicable exemptions.¹
- [6] One of the attributes is impairment.² ‘Impairment’, in relation to a person, is defined as including:
- the malfunction ... of a part of the person’s body; or
- a condition ... that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour’ ...³
- [7] One of the areas in which discrimination is prohibited is goods and services.⁴
- [8] ‘Indirect discrimination’ is explained in section 11:

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—

(a) with which a person with an attribute does not or is not able to comply; and

(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—

¹ *Anti-Discrimination Act*, s 6.

² *Ibid*, s 7(h).

³ *Ibid*, Schedule 1 (definition of ‘impairment’).

⁴ *Ibid*, Chapter 2, Division 4.

- (a) the consequences of failure to comply with the term; and
 - (b) the cost of alternative terms; and
 - (c) the financial circumstances of the person who imposes, or proposes to impose, the term.
- (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.

Example 1—

An employer decides to employ people who are over 190cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being no genuine occupational reason to justify it.

Example 2—

An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headdress.

- [9] An applicant complaining of discrimination must prove, on the balance of probabilities, that the respondent contravened the *Anti-Discrimination Act*,⁵ while the onus is on the respondent to prove, also on the balance of probabilities, that a term complained of is reasonable and/or that an exemption applies.⁶

The evidence

- [10] Eight exhibits were marked at the hearing, though these were not all in the nature of evidence as they included Mr Middleton's amended statement of contentions and Mirvac's amended response to those contentions. Mirvac had compiled most of the documents into a trial book,⁷ and for ease of reference I will use the trial book page numbers where applicable.
- [11] Oral evidence was given by Mr Middleton and his friend Mrs Margaret Williams, as well as by the shopping centre manager Ms Melanie Hodge.

Mr Middleton's case

- [12] The essence of Mr Middleton's case can be summarised as follows:
- (a) he has an attribute being an impairment namely post-traumatic stress disorder ('PTSD') / cynophobia with consequential psychological and physical health impacts;
 - (b) Mirvac imposes a term upon people entering the shopping centre that they must be willing to share the space with companion dogs;

⁵ *Anti-Discrimination Act*, s 204.

⁶ *Ibid*, s 205, s 206.

⁷ Page-numbered up to p 102.

- (c) a person with the attribute is not able to comply with that term because of the intense psychological and consequential physical effects of encountering dogs in that way;
- (d) a high proportion of people without the attribute are able to comply with the term;
- (e) the term is not reasonable for various reasons, including that it breaches food safety requirements, it effectively prioritises dogs over humans with vulnerabilities including impairment, frailty and youth, and it is hazardous for people accessing the medical centre to be exposed to diseased dogs going to the vet; and
- (f) the Tribunal should make orders including that Mirvac must prohibit entry to companion dogs, and that Mirvac must train staff on how to properly identify ‘assistance dogs’ for disabled people (which have a legislated right of entry to many areas in the centre) to ensure that shoppers do not bring in companion dogs pretending that they are assistance dogs.

Mirvac’s response

[13] Key points argued by Mirvac include, in summary:

- (a) Mr Middleton has not been diagnosed with cynophobia, and it is open to the Tribunal to conclude that he has not established on the balance of probabilities that he has the impairment that he has claimed;
- (b) no term was imposed on Mr Middleton because, at most, in entering the centre he would voluntarily assume a risk that he might encounter companion dogs;
- (c) Mr Middleton has failed to produce evidence of the proportion of people without the attribute who can comply with the alleged term;
- (d) allowing entry for companion dogs is reasonable as it caters for shoppers who want to bring companion dogs; it establishes a point of difference from other centres; and there are many centres that do not allow companion dogs where Mr Middleton can shop;
- (e) the shopping centre has rules, such as prohibiting dangerous dogs and requiring short leashes, that regulate the conduct of companion dogs and their owners; and
- (f) the retailers that would be directly affected by a prohibition on companion dogs, Petbarn, Greencross Vets and Bunnings, are not parties to the proceeding, so the Tribunal is not in a position to assess the cost on those businesses of a prohibition.

Does Mr Middleton have a relevant attribute?

Evidence of attribute

[14] Mr Middleton describes his attribute in his amended statement of contentions:

Impairment

1.1. Post-Traumatic Stress Disorder / Cynophobia from a life-threatening dog attack as diagnosed by Psychologist Clive Couperthwaite ... and endorsed

by Dr Tim White ... and both professionals have stated my condition has escalated to severe ...

1.2 Stress, Anxiety and Panic Attacks (chest pains, racing heart, rapid breathing, dry mouth, trembling) caused by companion dogs in close proximity is an identified uncontrollable reaction with people (as in my case) who suffer Post-Traumatic Stress Disorder / Cynophobia ... Note – Stress is one of the biggest killers in Australia. *Chronic stress can lead to a wide variety of physical and mental health problems. Indeed, perceived discrimination has been linked to issues causing anxiety, depression, obesity, high blood pressure and substance abuse. Discrimination can be damaging even if you haven't been the target of overt ... bias.*

...

1.3 Heart Attack and Chronic Heart Failure (cardiomyopathy) – Stress related.⁸

[15] Mr Middleton has also commented:

When in close proximity of a companion dog, my disability (PTSD) escalates to exceedingly dangerous consequences regarding my well-being, quality of life, life itself and mental status. It is hard enough in everyday living with companion dogs being allowed in outdoor dining areas which are on footpaths where people commute everyday, they are now allowed on beaches, parks and around other outdoor areas. Mirvac Real Estate Pty Ltd is fighting for the dogs to be inside ...⁹

[16] Mr Middleton says in his statement that on 19 January 2018 he went to Toombul Shopping Centre with Mrs Williams to have lunch for her birthday. He saw that Petbarn and Greencross Vets had opened stores in the centre. Upon seeing a dog inside the centre, he had an anxiety attack with hyperventilation and shortness of breath. He and Mrs Williams did not have lunch, and left immediately. Mrs Williams suggested they go somewhere else to eat but he did not think he could eat 'right now'.¹⁰

[17] Mrs Williams says in her affidavit that she and Mr Middleton had not been at Toombul Shopping Centre very long on 19 January 2018 when they became aware that companion dogs were present at the centre. She says that Mr Middleton 'became quite distressed and short of breath and let me know he needed to leave immediately'.¹¹ In her oral evidence, Mrs Williams described having also been elsewhere with Mr Middleton on occasions when upon encountering a dog he would shake, turn pale, have difficulty breathing, and feel a need to get away.

[18] Mr Middleton included in his material a letter from his psychologist Mr Clive Couperthwaite dated 20 August 2018 to his general practitioner Dr Tim White, and three reports of Dr White, dated 17 September 2018, 17 January 2019 and 29 November 2019.

[19] Mr Couperthwaite noted that he had seen Mr Middleton on three occasions. He said Mr Middleton's fear of dogs stemmed from an incident in his youth when he was knocked off his bicycle by a dog into the path of an oncoming bus. Mr

⁸ Trial book, 2.

⁹ Ibid, 3.

¹⁰ Ibid, 21.

¹¹ Ibid, 55.

Couperthwaite considered that Mr Middleton meets the diagnostic criteria for PTSD. Further, the PTSD is chronic and severe due to the intensity of the symptoms and the duration of the suffering. Mr Couperthwaite said:

... he has very intense emotions – primarily anger – linked to encountering dogs. He has developed a restricting, avoidant pattern of behaviour to prevent contact with dogs. His distress has led him to becoming active in campaigning against a trend to permit dogs access to public places. He intends to formally challenge local authorities ... He is of the opinion that if he has a clearly diagnosed mental health difficulty – linked to dogs that this will add credence to his appeal to the authorities ...¹²

... Mr Middleton displays a marked and persistent distress in relation to dogs – i.e. both actual and images (e.g. TV advertisements). Exposure provokes high levels of anxiety which is rapidly converted to anger. He responds to this by avoidance and this response has become increasingly limiting to his quality of life. He avoids public places where he might encounter dogs.¹³

- [20] Mr Couperthwaite did not diagnose a specific phobia, because he considered that one of the diagnostic criteria was absent.
- [21] Dr White reported in September 2018 that Mr Middleton has been his patient since July 2016, and that Mr Middleton's PTSD symptoms have worsened over time. Mr Middleton's overall level of anxiety has increased. Small triggers would now tip Mr Middleton into a state of heightened stress and anxiety. Stimuli that would not have previously provoked a response now did, such as seeing a dog on television. Contact with a dog results in a flight or fight response, with racing heart, rapid breathing, dry mouth and chest pain. Dr White noted that this state of heightened arousal was not healthy. For example, Mr Middleton had gained a significant amount of weight because of his inability to leave the house. Dr White noted that Mr Middleton was on medication to try to manage the symptoms of his PTSD.
- [22] In January 2019 Dr White reported that Mr Middleton had recently had an ischaemic cardiac event resulting in an ongoing rhythm abnormality. Dr White considered it highly likely that Mirvac's policy of allowing dogs into Toombul Shopping Centre was 'implicated in his ischaemic event'¹⁴ because of the extreme stress caused to Mr Middleton. Dr White said that Mr Middleton can no longer attend the shopping centre because he would be put at high risk of a further cardiac event.
- [23] Dr White reiterated his opinion in the November 2019 report. He noted that Mr Middleton had suffered a panic attack on 19 January 2018 upon encountering a companion dog at Toombul Shopping Centre. Dr White said that Mr Middleton's stress, anxiety and PTSD symptoms had since worsened, and that it is highly likely that his ongoing stress and anxiety associated with concerns around dogs is affecting his cardiovascular and mental health. Dr White also noted that Queensland Transport had begun allowing dogs on boats, which was exacerbating the effects on Mr Middleton's health.
- [24] Mr Middleton tendered photographs of the labels of his various forms of medication.¹⁵

¹² Trial book, 40.

¹³ Ibid, 41.

¹⁴ Exhibit 1.

¹⁵ Exhibit 7.

- [25] In cross-examination, it emerged that Mr Middleton and Mrs Williams share a home on the Gold Coast; that they have co-resided for eight years; and that for all of that time Mrs Williams has had a companion dog called Amber. Further, Mr Middleton has walked Amber on occasions, and Amber has accompanied them in the car to Toombul Shopping Centre in Brisbane.
- [26] Mr Middleton told the Tribunal that he does not hyperventilate in the presence of Amber. He explained his tolerance for Amber in terms of familiarity, saying that he has known Amber since she was a puppy. Mrs Williams, however, gave evidence that Mr Middleton has known Amber only since she was about three years old.
- [27] There are a number of photographs in the exhibits of dogs inside Toombul Shopping Centre, as well as photographs of the signage and layout. Mr Middleton's oral evidence was that Mrs Williams had taken the photographs. Mrs Williams was somewhat uncertain about whether she or Mr Middleton had taken some of the photographs. She said that Mr Middleton had taken some early photographs in the centre, and that she thinks that she took the photograph, but prompted by him, outside Bakers' Delight showing a white dog in a shopping trolley.¹⁶ Mrs Williams said that when they returned on later occasions to gather photographic evidence, Mr Middleton stayed in the car while she went inside. Asked about an image of a black dog with a yellow collar in a shopping trolley pushed by a woman in a red top,¹⁷ Mrs Williams said that Mr Middleton would have enlarged that image.
- [28] It is undisputed that Mr Middleton had taken the photographs of dogs on footpaths outside cafes at Burleigh.¹⁸ Mr Middleton says these were taken some years ago.
- [29] Mr Middleton and Mrs Williams both gave oral evidence that he generally does the household shopping, a few times per week, at their local shopping centre.
- [30] In cross-examination, Mr Middleton described having campaigned against the trend to increasingly allow companion dogs access to public spaces, since 2012 when they were first allowed in outdoor dining areas. He has raised the issue at local election rallies, and worked on a book about PTSD and cynophobia. He opposes companion dogs being allowed on to city cat ferries in Brisbane, and went most recently to a pier three weeks before the hearing to take photographs. Between January and June 2018 he made a series of complaints to Brisbane City Council about Mirvac's policy of allowing companion dogs into Toombul Shopping Centre, on food hygiene grounds, but to no avail. Mr Middleton also said that assistance dogs do not worry him. This is because they are thoroughly trained and well-behaved, whereas companion dogs can be unpredictable.

Submissions and analysis

- [31] Mr Middleton submits, in effect, that his evidence about his impairment is corroborated by the evidence of the health professionals and Mrs Williams. Further, Mrs Williams' evidence about the photographs should not be treated as conflicting with his, because she was not sure about who had taken photographs. Mr Middleton concedes that he has not been diagnosed with cynophobia, but he submits that there is a clear diagnosis of PTSD, which is a much more serious condition.

¹⁶ Trial book, 35.

¹⁷ Ibid, 48.

¹⁸ Ibid, 43 and 44.

- [32] Mr Ratanatray of JKR Lawyers, for Mirvac, submits that the evidence of the health professionals is ‘somewhat lacking in substance’, and that the Tribunal could reach the conclusion that Mr Middleton has failed to discharge the onus of establishing that he has the attribute of impairment that he contends. Mr Ratanatray submits that it is apparent that Mr Middleton sought the psychological diagnosis in order to gain credence for his campaign, after his attempts to have Brisbane City Council intervene failed. Mr Ratanatray submits, in effect, that the evidence which emerged in cross-examination casts serious doubt on the alleged severity of Mr Middleton’s condition. Mr Ratanatray submits that where the evidence of Mr Middleton and Mrs Williams conflicts, her evidence should be preferred.
- [33] There are conflicts between the evidence of Mr Middleton and Mrs Williams. He said he had known Amber since she was a puppy; Mrs Williams said that Mr Middleton first met Amber when she was about three. Further, while Mrs Williams was unsure about who had taken particular photographs, she said that Mr Middleton had taken some early photographs at the shopping centre. This is inconsistent with Mr Middleton’s evidence that Mrs Williams had taken all of the photographs. Further, Mrs Williams’ evidence of Mr Middleton taking some early photographs, and of him prompting her to take at least one photograph of a dog in the centre, is inconsistent with the implication in both of their written accounts that they hurriedly left the shopping centre on 19 January 2018.
- [34] Mr Middleton was quite guarded in giving his evidence, for example about where he lives. At one point he became so agitated under cross-examination that he packed up his things and left the hearing room. The fact that there is a dog living in his home was not stated in any of the extensive written material, and it was only revealed in cross-examination. Mrs Williams was considerably more straightforward and responsive in her oral evidence. In light of this difference in presentation, and the obvious incentive that Mr Middleton has to downplay any unremarkable interaction with dogs, I prefer the evidence of Mrs Williams where there is conflict. Accordingly, I find that Mr Middleton first met Amber when she was no longer a puppy. I find that he did take some of the photographs inside Toombul Shopping Centre, and prompted Mrs Williams to take at least one photograph of a dog in the centre. This detracts considerably from the account of an intense panic reaction. I also accept that Mr Middleton enlarged the image showing the black dog with the yellow collar. This is at odds with Mr Couperthwaite’s understanding of marked and persistent distress arising even from images of dogs.
- [35] Further, it seems highly likely that Mr Couperthwaite was unaware that Mr Middleton has been living with a dog for several years. If Mr Couperthwaite had been aware of it, then surely there would have been some explanation in his report of how that fact could fit with a diagnosis of severe PTSD associated with dogs.
- [36] Further, Dr White described Mr Middleton as being unable to leave the house because of a fear of dogs. However, it is apparent from the oral evidence of Mr Middleton and Mrs Williams that Mr Middleton does usually leave the house several times per week to go to the local shops. Further, there was also oral evidence of Mr Middleton accompanying Mrs Williams to Brisbane while she went into Toombul Shopping Centre to gather photographic evidence. Mrs Williams also described the two of them going to other shopping centres in Brisbane and the Gold Coast.
- [37] Overall, I see no reason to doubt that Mr Middleton has strong feelings about dogs being allowed into public spaces. However, I do not accept that he has symptoms

that come even close to approaching the severity of those that he described to the health professionals. It is apparent that Mr Middleton's inflated account of his reactions to dogs and his consequent lifestyle restrictions was relied on by Mr Couperthwaite in making his diagnosis of PTSD, and in turn by Dr White in assessing the consequential impacts on Mr Middleton's physical health.

[38] It may well be that Mr Middleton has some degree of psychological impairment resulting in stress that in turn contributes to heart problems. However, Mr Middleton has not produced reliable evidence of PTSD and, in turn, any consequential conditions. He has not proved, on the balance of probabilities, that he has the impairment for which he contends.

[39] Mr Middleton has not established that he has the contended attribute.

Conclusion in relation to Mr Middleton's complaint of discrimination

[40] As Mr Middleton has failed to establish that he has the contended attribute, the appropriate course is to dismiss his complaint.¹⁹

Application for miscellaneous matters

[41] On 16 July 2020, Mr Middleton had filed an application for miscellaneous matters seeking a closed hearing and a non-publication order. I refused the application for a closed hearing on 17 July 2020, and at the hearing I sought clarification from Mr Middleton about what form of non-publication order he was seeking. He said he thinks there should be an order preventing identification of a person who is the subject of a newspaper article attached to his statement,²⁰ but then acknowledged that she had already been publicly identified in that article. Mr Middleton said that he does not want his diagnosis publicised because that would be belittling, and, puzzlingly, that publicity would encourage dog owners to let their dogs jump on him. However, after further discussion, he indicated that he would prefer to have the publicity. I indicated that, accordingly, I would refuse the application for a non-publication order.

Conclusion

[42] The discrimination complaint will be dismissed, and the application for miscellaneous matters formally refused.

¹⁹ *Anti-Discrimination Act*, s 210.

²⁰ Trial book, 27.