

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: Kalwun Development Corporation Limited* [2019] QIRC 141

PARTIES: **Kalwun Development Corporation Limited** (Applicant)

CASE NO: AD/2019/84

PROCEEDING: Application

DELIVERED ON: 20 September 2019

MEMBER: O'Connor VP

HEARD AT: On the papers

ORDERS:

- 1. Kalwun Development Corporation Limited is exempt from the operations of sections 14, 15, 15A, 124, and 127 of the *Anti-Discrimination Act* 1991 in relation to the attribute in s 7(a).**
- 2. The exemption applies only in respect of actions or omissions which are reasonably necessary in relation to the advertising, recruitment, and employment practices for Young Wellbeing Workers at the Kalwun Development Corporation Limited.**
- 3. The exemption shall apply to Kalwun Development Corporation Limited for a period of five years from the date of this decision.**

CATCHWORDS: ANTI-DISCRIMINATION – EXEMPTION – DISCRIMINATION ON THE BASIS OF SEX – whether exemption for discrimination in work and work-related areas is available –

whether exemption is necessary – whether exemption is reasonable and appropriate – where exemption would provide certainty – exemption granted

LEGISLATION: *Anti-Discrimination Act 1991* s 7(a), s 14, s 15, s 15A, s 113, s 124, s 127, s 174B

CASES: *City of Brunswick: re. Application for Exemption from provisions of Equal Opportunity Act (1992)* EOC 92-450

Exemption application re: Boeing Australia Holdings Pty Ltd and Ors [2003] QADT 21

Exemption Application re: Mt Isa Mines Ltd [2001] QADT 16

Minister for Education and Commissioner for Equal Opportunity and Ors (1987) EOC 92-198

Stevens v Fernwood Fitness Centres Pty Ltd (1996) EOC 92-782

Reasons for Decision

- [1] On 19 August 2019 Kalwun Development Corporation Limited (the Applicant) filed an application for an exemption from the operation of specified provisions of the *Anti-Discrimination Act 1991* Qld ("the ADA").
- [2] The Kalwun Development Corporation's primary focus is to provide support to Aboriginal and Torres Strait Islander children and young people living within at-risk families throughout the Gold Coast region.
- [3] Kalwun's Child and Family Support Services division requires a team of two Young Wellbeing Workers. The application before the Tribunal states that one position has already been filled internally by a male employee. However, Kalwun has identified that, for the following reasons, the second position ought to be filled by a female employee:
- The primary focus of the position is to provide support for vulnerable Aboriginal and Torres Strait Islander children and young people living within at-risk families

throughout the Gold Coast area. The Youth Wellbeing Worker will enhance opportunities for these young people to participate in activities that support the development of self-worth, community inclusion and family relationship;

- The young people using the program will typically be from situations of abuse, violence and either have a history of prior offending or be at risk of offending;
- The current incumbent of the fulltime Youth Wellbeing worker is a male and will typically work with young indigenous males, and Kalwun requires a female Youth Wellbeing Worker to be the primary support for young indigenous females;
- The female Youth Wellbeing Worker will focus on the health and wellbeing of the young females and would include talking to them about personal issues. In indigenous culture, it is not appropriate for a male to ask a young female these types of questions, as they are considered 'Women's business'.

- [4] The exemption sought by the Applicant relates to ss 14, 15, 15A, 124 and 127 of the Act and is limited to the attribute in s 7(a) "sex" for a period of five years – the maximum period allowable under the Act.¹
- [5] Section 14 "Discrimination in the pre-work area" relevantly outlines that a person must not discriminate in relation to the arrangements made for deciding who should be offered work, or, in deciding who should be offered work. Section 15 "Discrimination in work area" prohibits discrimination in the workplace and covers terms of employment; access to opportunities; terminations of employment; training programs; and, the general treatment of the worker. Section 15A "Discrimination by principals" prohibits discrimination against a worker who does work, or is to do work, for another person because of a contractual arrangement between the principal and a third party, or another arrangement between a principal and a third party. Section 124 "Unnecessary information" prohibits a request of unnecessary information on which an unlawful discrimination might be based. Section 127 "Discriminatory advertising" is a penalty provision which prohibits the publication and display of advertisements which in any way contravene the ADA; the section also provides a clarification and defences.
- [6] Section 113 of the ADA confers a broad and unfettered discretion upon the Tribunal to grant an exemption from the operation of a specific provision of the Act. However, over time various considerations have been identified to assist the Tribunal in exercising its discretion to ensure that exemptions are only granted in appropriate circumstances.² Accordingly, the following matters may be considered:

¹ *Anti-Discrimination Act 1991* (Qld) s 113(6)(c).

² *United Synergies Ltd* [2015] QCAT 89; *Exemption application re: Boeing Australia Holdings Pty Ltd and Ors* [2003] QADT [12].

1. Whether the exemption is necessary;³
2. Whether there are any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought;⁴
3. Whether the exemption is in the community interest;⁵
4. Whether any other persons or bodies other than the applicants support the application;⁶
5. Whether it is reasonable and appropriate to grant the exemption;⁷ and
6. The effect of not granting the exemption.⁸

[7] I now turn briefly to deal with some of the factors in exercising the discretion under s113 ADA.

Is the exemption necessary?

[8] The exemption is necessary to provide certainty for the Kalwun Development Corporation in conducting recruitment of only women without fear of a complaint stemming from a requirement that would normally be unlawful under the ADA. Further, the exemption would assist Kalwun to provide culturally appropriate services to young female Aboriginal and Torres Strait Islander children and young people

Are there any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought?

[9] The Applicant has not identified any non-discriminatory ways of achieving the object or purpose for which the application is sought. However, having regard to the nature of the services being offered and the specific target group for those services, it is hard to identify any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought.

Is the exemption in the community interest?

[10] The Applicant provides support to vulnerable Aboriginal and Torres Strait Islander children and young people in the Gold Coast region. Through its Child and Family Support division, the Applicant is providing a much-needed service, in particular, its work with young females who come from situations of abuse, violence and offending. The service has a broader associated scope by offering support with personal and health issues. Clearly there exists a significant community need for the services offered by the Applicant. I accept that it is in the community interest to grant the exemption to permit

³ *Exemption Application re: Mt Isa Mines Ltd* [2001] QADT 16.

⁴ *City of Brunswick: re. Application for Exemption from provisions of Equal Opportunity Act* (1992) EOC 92-450.

⁵ *Ibid.*

⁶ *Minister for Education and Commissioner for Equal Opportunity and Ors* (1987) EOC 92-198.

⁷ *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.

⁸ *Minister for Education and Commissioner for Equal Opportunity and Ors* (1987) EOC 92-198.

the Applicant to deliver the services to young indigenous women in the manner set out in the application.

Are there any other persons or bodies other than the Applicant support the application?

- [11] The Queensland Human Rights Commission raises no objection to the exemption being granted to recruit specifically for male or female Wellbeing Workers. The material does not disclose if any person or body opposes the granting of the exemption.

Whether it is reasonable and appropriate to grant the exemption

- [12] As has been identified by the Tribunal when considering not dissimilar applications, issues involving domestic and family violence and/or sexual violence are fraught with cultural and gender restrictions simply due to the intimate nature of the subject matter.⁹ Kieran Chilcott, the Chief Executive Officer for Kalwun, deposes that it is a legitimate operational requirement for Kalwun to recruit a female employee to undertake the role of a Youth Wellbeing Worker to provide support services to young female Aboriginal and Torres Strait Islander children and young people in situations arising out of abuse, violence and offending.¹⁰ Recognising Indigenous culture together with the nature and circumstances surrounding the delivery of the services by the Applicant, it is, in my view, both reasonable and appropriate for the exemption to be granted.

The effect of not granting the exemption.

- [13] It is apparent that having regard to the nature of the services being offered and the target group for those services, it is my view that the failure to grant the exemption would severely impact or prevent the delivery of those services.

Terms of the application sought

- [14] I note that the Applicant has confined its application to the recruitment of female Youth Wellbeing Workers. It is probable that it will become necessary during the life of the proposed exemption to recruit a male Youth Wellbeing Worker. In those circumstances, it is appropriate to amend the application before the Tribunal to deal with that possibility. Such an amendment was alluded to in the correspondence of the Human Rights Commission of 29 August 2019.

- [15] The Tribunal has the power to make such an amendment under s 174B of the ADA. Section 174B of the ADA relevantly provides:

⁹ See: *Re The Women's Legal Service Inc* [2019] QIRC 060

¹⁰ Affidavit of Kieran Chilcott affirmed 16 August 2019.

174B Functions of the industrial relations commission

The industrial relations commission has the following functions—

...

(b) to grant exemptions from this Act in relation to work-related matters;

...

(e) to take any other action incidental or conducive to the discharge of a function mentioned in paragraphs (a) to (d).

[16] Accordingly, the application is amended so that the exemption will apply in respect of actions or omissions which are reasonably necessary in relation to the advertising, recruitment, and employment practices for Young Wellbeing Workers at the Kalwun Development Corporation Limited.

[17] The amendment will cover the circumstances where it might be necessary to recruit either a male or female Youth Wellbeing Worker.

Conclusion

[18] I am satisfied that the Tribunal should grant the exemption sought.

[19] I note that the exemption requested is for 5 years. That request is consistent with the previous orders made by QCAT on similar applications. In the absence of any compelling reasons or objections I am minded to grant the order for a period of five years from the date of this decision.

Orders

1. **Kalwun Development Corporation Limited is exempt from the operations of sections 14, 15, 15A, 124, and 127 of the Anti-Discrimination Act 1991 in relation to the attribute in s 7(a).**
2. **The exemption applies only in respect of actions or omissions which are reasonably necessary in relation to the advertising, recruitment, and employment practices for Young Wellbeing Workers at the Kalwun Development Corporation Limited.**
3. **The exemption shall apply to Kalwun Development Corporation Limited for a period of five years from the date of this decision.**