


- His continuing physical and psychological disability caused by the accident; and
- The difficulty in locating suitable work for a man of his age, qualifications and background.¹⁰ 

Endnotes:

- ¹ President Mason and Justices of Appeal Meagher and Heydon concurring.
- ² at para 7.
- ³ (2002) 76 ALJR 1348.
- ⁴ at para 20.

- ⁵ at para 22.
- ⁶ at para 8.
- ⁷ at para 16, 44-45.
- ⁸ at para 39-42.
- ⁹ at para 30.
- ¹⁰ at para 108-110.

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Discrimination on the basis of pregnancy

Gardner v All Australian Netball Association Limited [2003] FMCA 8

Facts

Ms Gardner was an elite netballer and captain of the Adelaide Ravens. All Australia Netball Association (AANA) was the federal body organising the sport of netball in Australia. Its member organisations were state and territory organisations that controlled netball in their respective jurisdictions.

South Australia's member, South Australian Netball Association (SANA), had two teams in the national competition. These were made up of players from feeder teams.

Importantly, Ms Gardener was not and could not be a member of AANA or SANA. She was, however, a member of a feeder club in South Australia.

On 18 June 2001, AANA imposed an interim ban preventing pregnant women from playing. Ms Gardener was pregnant at the time the interim ban was imposed and as a result she missed three matches.

Ms Gardener complained to the Human Rights and Equal Opportunity Commission (HREOC), claiming she was discriminated against on the basis of pregnancy and that this breached the *Sex Discrimination Act* 1984 (Cth).

At the hearing, the respondent

accepted that the interim ban had discriminated against the applicant on the basis of pregnancy, but claimed that the Act was exempt by virtue of section 39, which states:

'Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person's sex, marital status or pregnancy, in connection with:

- The admission of persons as members of the body; or
- The provision of benefits, facilities or services to members of the body.'

The respondent argued that membership in these circumstances could be viewed as a chain. The player was a member of a club, the club was a member of SANA, and SANA was a member of AANA, and hence the exemption was applicable.

Findings

Federal Magistrate Raphael accepted that the words 'in connection with' extended the meaning of both 'admission' and 'provision of benefits, facilities or service' to include the terms and conditions upon which admission and benefits were offered or refused.

The Magistrate did not accept that the words could be used to expand the definition of members.


He found that 'because of the awkward wording of the definition of "discrimination" and "indirect discrimination" there is already authority which

has the effect of requiring complainants to carry out complex exercises in statistics in order to ascertain whether or not they have been treated less favourably than other persons.'

Regarding section 39, the Federal Magistrate held that: 'The clause offends against the now accepted proposition that discrimination in any shape or form is wrong. It does so in order to promote what has obviously been considered a higher purpose, namely freedom of association. If a voluntary organisation wishes to take advantage of this section then it is entitled to do so. But if it constitutes itself in a way which puts up a barrier towards it taking advantage, the courts should not come to its aid.'

Ms Gardener was not and could not be a member of either AANA or SANA, so the exemption was not available.

Accordingly, it was found that AANA discriminated against Ms Gardener by preventing her from playing and Ms Gardener was awarded \$6,750 in agreed damages.

This case reaffirms the principle that exemptions in beneficial legislation, such as the various discrimination statutes, will be given a narrow interpretation. Practitioners should be cautious when interpreting exemptions in the discrimination statutes to ensure they reflect the precise wording of the exemption, and not an expanded interpretation, such as that argued by the respondent in this case. 

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