Statutory Interpretation Of Whether Specific Public Statements Relating To Same-sex Marriage Amounted To Homosexual Vilification

On December 12, 2019, a Civil and Administrative Tribunal (D Dinnen, Senior Member; J Newman, Member) struct down verbal homophobic remarks in the Passas v Comensoli ('Passas') [1] case. This case concerned the question of whether specific public statements relating to same-sex marriage amounted to homosexual vilification. [2] The two parties involved were Julie Helen Passas (Appellant) [3] and Daniel Comensoli (Respondent). [4] This case is noteworthy as it addresses the legal issue of whether or not such conduct constitutes unlawful homosexual vilification under ss 49ZS and 49ZT of the Anti-Discrimination Act 1977 (NSW), ('ADA') [5] and makes known that public statements ridiculing same-sex marriage do amount to homosexual vilification and are considered unlawful. The Passas [6] case was decided in correspondence to the correct interpretation of the ADA especially seen in the amendments made by the Appeal Panel, therefore, represented good judgement. [1: Passas v Comensoli [2019] NSWCATAP 298 ('Passas').] [2: Anti-Discrimination Act 1977 (NSW) s 49ZT ('ADA'). This legislation has defined the word 'vilification' a 'as a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group'.] [3: Trischa Mann and Audrey Blunden, Australian Law Dictionary (Oxford University Press, 1st ed, 2010). The word 'Appellant' is defined as 'a party who, having lost a case in court, brings an appeal against the decision of the court'.] [4: Ibid. The word 'Respondent' is defined as 'the party in defendant to the appeal'.] [5: Passas (n 1) [4].] [6: Passas (n 1).]

II The Facts

Mr Comensoli, after the results of the 'Yes Vote', hung a large rainbow flag on the front balcony of his apartment residence in Ashfield, NSW on 15 November 2017. Ms Passas, who lived in a nearby residence, demanded loudly that Mr Comensoli should remove the flag because it was 'offensive to [her] culture and religion', [7] and that the Respondent should not be allowed the right to marry 'until [he] could breastfeed and have children'.[8] [7: Passas (n 1) [3].] [8: Ibid.]

One witness of the event, Ms Di Natale, said that she could hear the words said, however, there have been no other complaints. It is understood that people nearby may have also heard the words.

She was overheard saying 'the rainbow flag was as offensive as the flag of ISIS' [9] when the police arrived at her house. She stated that it was an analogy. [9: Passas (n 1) [30] (d).]

After stating that the strata rules forbade the hanging of items off balconies, Ms Passas considered her actions were suitable due to her position on the Executive Committee of the apartment complex's strata.

At the time of the incident, Ms Passas had been a member of the local council for 11 years and

was the Deputy Mayor of the Inner West Council.

III Proceedings

The Appellant appealed on grounds of law and sought leave to appeal against the first instance of the decision of the Tribunal. This was based on the lack of evidence to support the Respondent being a member of the group allegedly vilified. [10] This was centred on the terms of section 49ZT of the ADA. [11] [10: Passas (n 1) [16].] [11: ADA (n 2).]

The Appeal Panel (Dr R Dubler SC, Senior Member; J McAteer, Senior Member) agreed with finding of vilification in regards to the second statement, not the first; made changes to the apology to be published; but kept the $2,500 penalty as seen by the Panel to be a suitable amount for the second statement which amounted to vilification.

The appeal focused on the grounds that it was an essential part of an application to the Tribunal that the Respondent establish that he was a member of the group alleged to have been vilified. The Appellant stated that the Respondent failed to provide any evidence of being homosexual while referring to paragraph [43] of the Decision in which the Tribunal stated that the context of the interactions between the Applicant and the Respondent reveal that the Respondent did believe the Applicant was homosexual. [12]This statement was reviewed in correspondence to section 49ZF of the ADA which states: ‘A reference in this part to a person’s homosexuality includes a reference to the person’s being thought to be a homosexual person, whether he or she is in fact a homosexual person or not.’ [13] [12: Passas (n 1) [43].] [13: ADA s 49ZF.]

The second statement said by Ms Passas was held by the Tribunal that: ‘The objective understanding of this statement is that a person who cannot breastfeed or have children should not be afforded an equal right to marry the person of their choosing.’ [14] The statement was also upheld to amount to vilification by the Appeal Panel. The remark said by Ms Passas to Mr Comensoli ‘You should not have the right to marry until you can breastfeed and have children’ [15] was upheld on the appeal as there must be an ‘error of law’ stating: [14: Passas (n 1) [41].] [15: Passas (n 7).]

Irrespective of what may be our impression or view of the effect of the statement, we have concluded that with respect to this second statement it was reasonably open for the Tribunal to hold that the facts of the case fall within the ordinary meaning of the words of the statute so that no error of law arises. [16] [16: Ibid.]

As the Appeal Panel justified Ms Passas’ first statement, the apology was changed. The first apology ordered to be published by the Tribunal stated: ‘That evening, I publicly yelled abuse at Mr Comensoli…’ The Appeal Panel agreed when Ms Passas disputed the use of the words ‘yell’ and description of what she said as ‘abuse’, neither of which were specific findings of the Tribunal. The final approved apology replaced those terms writing ‘made statements’ [17] instead. [17: Passas (n 1) [110].]

IV Ratio Decidendi

The Ratio Decidendi (the reason for decision) for this case is based on Ms Passas’ statement that the rainbow flag disrespects her culture and religion, which was not considered homosexual

vilification by the Appeal Panel as it covered by the ADA. [18] [18: ADA (n 2).]

These defences are:

Nothing in this section renders unlawful:

1. a fair report of a public act referred to in subsection (1), or
2. a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or
3. a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter. [19] [19: ADA (n 2).]

This section in the legislation proves that Passas' first statement was merely a debate about homosexuality, rather than spoken in a verbally unconscionable manner seeking to harm Mr Commensoli. This is affirmed particularly in part (c) of the section above, which clarifies that Passas' first statement could be classified as a 'debate' [20] therefore, should not be amounted to vilification, as it was in the Tribunal. [20: Ibid.]

The Burns v Sunol ('Burns') [21] case was utilised as a precedent in determining the outcome of Ms Passas' first verbal speech was in an effort to express her opinion and beliefs. This case concerned a series of publications written by Respondent John Sunol which were found to amount to homosexual vilification. They included several statements of written ridicule of homosexuals. The case stated that 'It is not unlawful for Mr Sunol to express his disagreement or indeed his disgust, with marriage between people of the same sex. That kind of sentiment does not reach the threshold inciting hatred or serious contempt for such people on the ground of homosexuality.' [22] The Burns [23] case is similar to the Passas [24] case as they both consisted of proclaimed comments which were viewed as offensive to the homosexual community. The finding in the Tribunal was contrary to the principle referred in the case, allowing the Appeal Panel to conclude that there is no vilification in Ms Passas' first statement to Mr Comensoli, but the second statement she made still amounted to vilification as it was found to have a potential to 'incite'.[25] [21: Burns v Sunol [2012] NSWADT 246 ('Burns'). See also Kazak v John Fairfax Publications Limited [2000] NSWADT 77, [40].] [22: Burns [31].] [23: Burns (n 21).] [24: Passas (n 1).] [25: Passas (n 1) [15].]

The Ratio Decidendi, therefore, reveals two different outcomes which are based on the separate statements Ms Passas made.

V Holding/ Decision

The Chief Justice found Ms Passas guilty of Homosexual Vilification under the ADA. [26] The Appellant did not dispute the Tribunal's statement of the definitions of legal principles mentioned in the key terms of ADA [27] 'public hate' and 'incite', [28] which were factors leading to the final decision of the case, due to the discussion of their definitions and their alignment to Ms Passas' incident. [26: ADA (n 2).] [27: Ibid.] [28: Passas [9]-[13].]

The significance of the public positions held by Ms Passas', which were Deputy Mayor and Council Member, was also taken into account by the Appeal Panel. It was said by the Appeal Panel that the Tribunal was not 'erroneous' in holding Ms Passas' public positions as she could have created a greater impact on an audience. [29] However, it is unclear the extent of the impact this had on the compensation amount. [29: Passas (n 1) [66]-[67].]

The Respondent (Appellant on appeal) was ordered to publish an apology, which was reworded by the Appeal Panel after finding no vilification in her first statement which differed to the finding of vilification at first instance in the Tribunal, for her conduct in the Inner West Courier Newspaper within 14 weeks of the publication of the Decision of the Appeal Panel.

Ms Passas was fined an amount of $2,500 which was considered a low amount compared with the maximum penalty as her comment that the flag was 'offensive to [her] culture and religion' [30] would not amount to homosexual vilification, however, is a reasonable sum due to the second statement which was considered an act of homosexual vilification as well as the effect her political role would have had on the comments she made. [30: Passas (n 6).]

VI Impact Of The Case

The Passas [31] case concerns one of the most relevant and contentious issues of today's society. Whether such remarks made by Ms Passas are considered 'vilification' and whether or not they 'incite' an individual's emotions were investigated. This case is impactful as it reiterated the stance of the court on homosexual vilification as unlawful [32] and used the Burns [33] case as a precedent to reinforce this stance. Its legal significance is evident as it explains that remarks, whether or not it is known that an individual is homosexual, can be also considered homosexual vilification. This case has also addressed the underlying legal issue of the interpretation of unlawful homosexual vilification under sections 49ZS and 49ZT of the ADA.[34] Furthermore, the finding of no vilification in relation to Ms Passas' first statement to Mr Commensoli by the Appeal Panel is significant as it found an error in the Tribunal's judgement at first instance and may be referred to in similar cases in the future. [31: Passas (n 1).] [32: Passas (n 6).] [33: Burns (n 19).] [34: Passas (n 5).]

The case has triggered different opinions to arise regarding the final decision. In his blog, Neil Foster explains why he disagrees with the decision in his post 'Opposing Same-Sex Marriage is not "Vilification"' where he writes 'the Appeal Panel's view that the other comments were unlawful vilification seem, with respect, to be open to doubt', [35] stating that disagreement with the same-sex marriage does not amount to vilification under NSW law. There have been several news articles written about the case such as ABC News' article 'He Hung the Rainbow Flag to Celebrate Same-Sex Marriage — But One Neighbour Wasn't Impressed'. [36]The newsworthiness of this case proves the significant impact it had in society and in the court, potentially acting as a precedent for future cases. [35: Neil Foster, 'Opposing Same-Sex Marriage Is Not Vilification', Thefreedomsproject.Com (Webpage, 2020) .] [36: Sarah Thomas, 'He Hung The Rainbow Flag To Celebrate Same-Sex Marriage — But One Neighbour Wasn't Impressed', ABC News (Webpage, 2019) .]

VII Commentary

The Passas v Comensoli [37] case was a fair judgement, especially after the Appeal Panel

rightly found no vilification in the first statement said by Ms Passas. However, there is some obscurity on whether the fact that she held a political position either made her more likely to be accused of having “incited” the emotions, or whether it affected the penalty which resulted from her second statement. Nevertheless, as one of the statements amounted to homosexual vilification and was considered a form of hatred, the final decision was just. [37: Passas (n 1).]

Bibliography

A Articles/ Books/ Reports

1. Cranmer, Frank, Law and Religion Round-Up (Newstex, 2020)
2. Foster, Neil, ‘Opposing Same-Sex Marriage Is Not Vilification’, Thefreedomsproject.com (Webpage, 2020)
3. Muscat, Patricia and Dr Keith Thomas, ‘The High Court Finds ACT Same Sex Marriage Law Invalid’ (University of Notre Dame Australia)
4. Thomas, Sarah, ‘He Hung The Rainbow Flag To Celebrate Same-Sex Marriage — But One Neighbour Wasn't Impressed’, ABC News (Webpage, 2019)

B Cases

1. Burns v Sunol [2015] NSWCATAD
2. Kazak v John Fairfax Publications Limited [2000] NSWADT 77
3. Passas v Comensoli [2019] NSWCATAP 298

C Legislation

1. Anti-Discrimination Act 1977 (NSW)
2. Civil and Administrative Tribunal Act 2013 (NSW)
3. Defamation Act 2005 (QLD)

D Other

1. Mann, Trischa and Audrey Blunden, Australian Law Dictionary (Oxford University Press, 1st ed, 2010)