



Australian
National
University



2020 ANU Gender Identity + Sexuality Law Moot

In the Full Court of the Federal Court (online)

BETWEEN

Earnest Bruie (First Appellant)
Aditi Aberdeen (Second Appellant)

AND

Edinburgh Grammar (Respondent)

I AGREED FACTS

1. Edinburgh Grammar is a private school in Yass, New South Wales, which is owned and run by the Liberation Presbyterian Church of Australia. Two thousand boys attend the single-sex school. Known fondly as ‘the Eg’ the school is proud of how many alumni have gone on to have distinguished careers in politics, business, science, the arts and sport. The school motto – proudly on display above the blue St Andrew’s cross in the school’s coat of arms – is ‘*Deo, Imperium, Scientia*’.
2. The Archbishop of the Liberation Presbyterian Church released a statement in January 2020 to the following effect:

“The Liberation Presbyterian Church reaffirms that the word of God maintains that marriage and sexual intimacy is between a man and a woman. The Church loves and accepts all people, regardless of race, gender, economic or social status. However, the Church does not affirm all ways of life. We believe that no sin is unforgiveable, and each and every one of us is on a journey towards redemption, so that all members of our Church may become one with the teachings of Our Lord Jesus Christ.”

3. The school prides itself on instilling strong Presbyterian values among its students. It was the subject of media scrutiny during the marriage equality plebiscite for adopting a ‘Vote No’ stance. While the position angered many among the school community, it was endorsed unanimously by the board of directors and a majority of the teaching staff. The school similarly publicly supported Israel Folau and Margaret Court, stating they had ‘the right to publicly state their views without fear of judgment’. The school asks staff to follow the Church’s teachings in their personal lives.
4. In 2020 the Eg chose for its senior production ‘Joseph and the Amazing Technicolor Dreamcoat’. Mindful of the fact that the Bible features women, the Eg elected to partner with its sister school, the Reformed Ladies College of Gundagai. The production did not go as planned. Participants were frustrated by the lack of leading roles available for women, and successfully demanded that anyone should be able to audition for any role, no matter the sex of the character.
5. The manager of the production was Ms Aditi Aberdeen, a drama and Christian education teacher at the Eg. She welcomed the change to the auditions process but found it difficult to convince the school board to accept it. The board was concerned that gender-blind casting in an ostensibly religious musical would undermine the school’s values.
6. During the production process, Ms Aberdeen found that some of the students appeared to struggle to take the new process seriously. Many of them giggled at their peers playing characters of a different gender, finding the apparent incongruity hilarious.
7. Earnest ‘Ern’ Bruie, a Yass local, is an Egian who successfully tried out for the role of Mrs Potiphar in the production. Ern had for quite some time felt equally comfortable wearing men’s and women’s clothing. Ern had long questioned whether they fit into

the binary categories of ‘male’ or ‘female’. They found the other students’ giggles confusing and hurtful. The production was successful, and tickets sold out each night. Ern’s portrayal of the besotted Mrs Potiphar was especially noted.

8. After the production, Ern continued to consider why the chuckles had been so hurtful. Ern concluded that playing the role of the female Mrs Potiphar had felt no more or less alien than being forced to wear the Eg’s school uniform. Ern continued to explore their gender identity after school and on the weekends. They began doing research online and joined an internet forum for LBGTIQ+ teens to learn more. At school, Ern continued to wear the uniform, but became increasingly uncomfortable with the way the uniform forced them to present themselves within the strict gender binary. Ern began to wear accessories like necklaces and bangles beneath the collar and cuffs of the school shirt to feel more like themselves.
9. When another student saw these accessories as the two were changing out of their PE gear to go to drama class, he asked Ern about them, who decided to confide in him. “I think of myself as neither male nor female,” said Ern, “and I feel most like myself when I present as neither category. These accessories help me do that.” Ern was surprised to see the boy nod and shrug his shoulders. Ern was even more surprised to hear him ask whether he should continue to refer to Ern as ‘he/him’. Flabbergasted, Ern responded, “I’m honestly not too sure, can I get back to you on that one when I have a better idea? And in the meantime, can I ask you to keep this between us?” The other student agreed, nonplussed, as the two waited for Ms Aberdeen to arrive for class.
10. Upon further reflection Ern decided to talk with one of the school counsellors about what the other student had said and how Ern increasingly felt they identified with neither ‘male’ or ‘female’ categories. The Counsellor instructed Ern in the relevant teachings of the Presbyterian Church, but provided a referral for an external counsellor whom Ern began to see regularly.
11. The School Counsellor decided to mention the fact that Ern was potentially non-binary or transgender to the School Reverend, seeking advice on what to do and wondering how the school would respond. The Reverend told the Counsellor to do nothing at this stage but to let him know if Ern made any further statements about the ‘issue’.
12. Later that year, before a meeting of the school board, Ms Aberdeen accidentally referred to her partner as ‘she’ in small talk with the Reverend. When questioned, she confirmed that she had been with her female partner for several years. Alarmed, the Reverend asked whether Ms Aberdeen found her role as a Christian education teacher at a Presbyterian school difficult to reconcile with her sexuality. The Reverend reminded Ms Aberdeen that the theological position of the Liberation Presbyterian Church and Edinburgh Grammar is that marriage ought to be between one man and one woman. The Reverend then made reference to the letter which the two had signed urging members of the school community to vote against same-sex marriage which stated that ‘According to the teachings of our Church, all sex outside the heterosexual



marriage is sinful, as are all feelings of homosexual romantic attraction and desire'. Ms Aberdeen acknowledged there was some discord between her sexuality and her faith, but reminded the Reverend of the sermon earlier that week on John 8:7, 'Let him without sin cast the first stone.' Ms Aberdeen stated further, "my faith instructs me that to find a moral teacher on earth unblemished by sin has not been possible since the fall of man, with one very notable exception."

13. The Reverend took Ms Aberdeen's point, but remained uncomfortable with her continuing to teach Christian education. When asked whether she would teach the proper doctrine on homosexuality with the 'requisite vigour', Ms Aberdeen explained that she would continue to teach the school's official positions on gender and sexuality as was required, but felt comfortable reconciling her faith and sexuality in her private life.
14. The Reverend was horrified by the revelations of Ms Aberdeen's sexuality but decided he would need clear evidence to show the school board if he were to take further action. The following afternoon while in the staffroom, the Reverend noticed Ms Aberdeen had left her phone sitting on the table while she was making coffee. At that moment, a message from someone called 'Tamara' flashed up on the screen. The message read: "I'll see you at home tonight, I picked up sausages for dinner. Love you." The Reverend pulled out his own phone and took a photo of the offending message before Ms Aberdeen had returned.
15. Later that day the School Counsellor again spoke to the Reverend. The Reverend said that Ern had come to see him to thank him for referring him to the other counsellor, who had helped Ern understand that they were non-binary. Ern wanted to know how to communicate the fact to the school and their classmates, and had sought confidential advice from him.
16. The Reverend reeled from the twin revelations of Ms Aberdeen's sexuality and Ern's gender identity. He returned home and grappled with how to reconcile the Church's position on homosexuality and gender identity without 'casting the first stone'. He resolved that he would have Ms Aberdeen removed from her capacity as a Christian education teacher without firing her. He further resolved that he would inform the students in his next sermon that although they were welcome regardless of their sexuality, this was emphatically a single-sex boy's school, and that students who had a different gender identity should find a different school.
17. After his sermon the following day, the Reverend went to a meeting with staff and student representatives, in which the sermon was heavily debated and discussed by all present, many of whom were interested to know what had caused him to make such a statement. The Reverend informed those present that he was motivated by the fact that Ern was "non-binary or transgender or something like that." When asked how he knew this the Reverend mentioned that the Counsellor had told him about some things Ern

had said. The Reverend affirmed that if it continued it was his opinion that Ern should be asked to leave the school.

18. Later that day, Ms Aberdeen, was shocked to learn that she had been relieved of her responsibilities as a Christian education teacher, and would instead be moved to full-time drama teaching. Upon asking the Principal the reason for the move, Ms Aberdeen was told that “while what you do in your private life is of course separate from your work, the board felt that you could no longer convey the school values to the students appropriately.”
19. Ern was similarly surprised to be summoned for a private meeting with the Reverend where the Reverend told Ern that “while you are welcome to stay, the school accords with the Liberation Presbyterian Church’s teachings regarding gender and you must identify as a boy and be referred to by staff and students as he/him.”
20. Two weeks later, Ern learned that their identity had been discussed at the staff-student forum, after one of the student representatives mentioned it, asking how Ern wanted to be referred to. While the representative showed tact, not all the students and teachers at the Eg acted the same way. Over the following weeks, Ern experienced name calling, threats and ridicule from their peers and even some of Ern’s teachers, who made an effort to publicly embarrass Ern in front of their classmates and refused to use their correct pronouns. Ern was furious, embarrassed, and scared, and subsequently left the Eg and enrolled in a co-educational non-denominational school. Ern however struggled to adapt to the classes, fearing other students and staff would react the same way they had at the Eg. Ern was subsequently diagnosed with depression and anxiety.
21. Ms Aberdeen mentioned what had happened to one of her university friends, who suggested she should get in touch with a lawyer as it sounded like the school had discriminated against her and that the actions of the Reverend may have breached her privacy. Ern’s parents meanwhile contacted lawyers to recoup costs of medical appointments and for the anxiety and fear Ern was now living with due to the actions of staff and students at the Eg. The lawyer, renowned for their work on emerging areas of the law, suggested they argue for a novel cause of action surrounding invasion of Ern’s privacy in addition to a discrimination claim.

II COURT ACTION

Aberdeen and Bruie lodged separate actions in the Federal Court against Edinburgh Grammar under s5A and 5B *Sex Discrimination Act 1984* (Cth) respectively claiming that Edinburgh Grammar discriminated against them on the basis of their sexual orientation or gender identity. They both also lodged a novel cause of action claiming that through an employee, Edinburgh Grammar had breached their right to privacy.

Justice Li of the Court ordered the actions joined given the similarity in the claims brought and after hearing the cases ordered that:

...

Regarding the discrimination claims:

Given that the discrimination occurred in NSW the only relevant legislation to consider is the *Sex Discrimination Act 1984* (Cth). In undertaking the assessment required by the Act I make the below findings:

Edinburgh Grammar, through the actions of its board, Reverend and staff discriminated against Aberdeen and Bruie on the basis of their sexual orientation and gender identity but Edinburgh Grammar was exempt from the requirements of the *Sex Discrimination Act 1984* (Cth) due to the operation of s 38. In particular, given the balancing purposes of the Act and the clear exemptions afforded in the Act, the government had intended religious schools to educate students in accordance with the doctrines of their faith. The dominant consideration therefore is the religious beliefs, which can be assessed based on the school's values and statements of relevant religious officials. Considering the strict requirement of the faith, Edinburgh Grammar discriminated in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Therefore, the applicants must fail on the discrimination cause of action.

Regarding the privacy claims:

This is a novel cause of action raised before the court. Although not previously established under Australian law, the High Court left open in *ABC v Lenah* the possibility of the development of a tort of invasion of privacy in Australia. The common law is fluid, and judges have accepted that it needs to respond to changes in community expectations. This includes the need to adapt to changing technologies and changing practices. In the recent case of *Smethurst v Commissioner of Police* the High Court implied that had counsel advanced an argument that such a tort would exist then they would be interested in hearing submissions on that point. While this should not be taken as a statement of law or general principle, these arguments have been advanced in this case. International courts, especially in the US and New Zealand have notably developed such a tort and this case is an appropriate vehicle to develop the law. It is a simple fact that law should be there to protect individuals. The question of the test to apply is more contentious, given the arguments advanced before the Court the test should be one requiring:

1. The public disclosure of facts of which, given the circumstances, there is a reasonable expectation of privacy; and

2. Public exposure of those facts would be offensive or objectionable to a reasonable person of ordinary sensibilities.

As Edinburgh Grammar is vicariously liable for the actions of its employees, and I am satisfied that the Reverend and Counsellor breached the privacy of Aberdeen and Bruie on the balance of probabilities, the applicants succeed in relation to the privacy claim.

The parties are to make further submissions to the appropriate damages awards and to costs.

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III APPEAL GROUNDS

Edinburgh Grammar, Bruie and Aberdeen appealed the judgement to the Full Court of the Federal Court. Both Ern Bruie and Aberdeen appealed the finding that the discrimination by Edinburgh Grammar was covered by the exemption in s 38 of the SDA, while Edinburgh Grammar cross-appealed the finding that it had breached both Bruie and Aberdeen's privacy. The Full Court granted leave to appeal on the following questions:

1. Whether Justice Li erred in her interpretation of the exemption in s 38 of the *Sex Discrimination Act* as it applied to the discrimination experienced by Ern Bruie
2. Whether Justice Li erred in her interpretation of the exemption in s 38 of the *Sex Discrimination Act* as it applied to the discrimination experienced by Ms Aberdeen
3. Whether Justice Li erred in ruling that a tort for invasion of privacy exists under Australian law
4. Whether Justice Li erred in determining that where such a tort exists, Edinburgh Grammar breached the privacy of both Ern Bruie and Ms Aberdeen.

The Court refused leave to appeal on the question of whether Edinburgh Grammar was vicariously liable for the actions of its employees.