ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MACCA v AUSTRALIAN CAPITAL TERRITORY REPRESENTED BY EMERGENCY SERVICES AGENCY (Discrimination) [2017] ACAT 101

DT 10/2016

Catchwords: **DISCRIMINATION** – sex – recruitment targets – role of the Tribunal under the *Discrimination Act 1991* – meaning of 'equal opportunity' under the *Discrimination Act 1991* – substantive equality – reasonableness of proportionality test – whether the decision maker reasonably believed that the implementation of the recruitment targets would achieve its goal of enhancing equal opportunity for women

Legislation cited: *Discrimination Act 1991* ss 7, 8, 10, 27, 70
Human Rights Commission Act 2005 ss 53E
Legislation Act 2001 ss 140, 141

Cases cited: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay and Another* (2012) 248 CLR 500
D v Commissioner for Social Housing & Ors [2010] ACAT 62
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577
Macca v Australian Capital Territory Represented by Emergency Services Agency [2017] ACAT 19
Richardson v ACT Health & Community Care Service [2000] FCA 654
Shi v Migration Agents Registration Authority (2008) 248 ALR 390
Woodbury & Ors v Australian Capital Territory [2007] ACTDT 4

Tribunal: Senior Member H Robinson

Date of Orders: 4 December 2017
Date of Reasons for Decision: 4 December 2017

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) DT 10/2016

BETWEEN:

PHIL MACCA
Applicant

AND:

AUSTRALIAN CAPITAL TERRITORY REPRESENTED BY EMERGENCY SERVICES AGENCY
Respondent

TRIBUNAL: Senior Member H Robinson

DATE: 4 December 2017

ORDER

The Tribunal orders that:

1. The application is dismissed.

……..
Senior Member H Robinson

REASONS FOR DECISION

1. The applicant alleges that the recruitment target (**the Target**) for women adopted by ACT Fire and Rescue (**ACTFR**) in its 2016 recruitment campaign (**2016 campaign**) constituted unlawful discrimination under the *Discrimination Act 1991* (ACT) (**Discrimination Act**) on the basis that it treats male applicants unfavourably on the basis of their sex.

Background

2. The relevant background to this matter is set out in *Macca v Australian Capital Territory Represented by Emergency Services Agency* [2017] ACAT 19 at paragraphs 3 to 27.

The Law

3. Section 53E of the *Human Rights Commission Act 2005* (**HRC Act**) provides:

> *(1) This section applies if—*
>
> *(a) the commission refers a complaint to the ACAT under this division; and*
>
> *(b) the ACAT is satisfied that the person complained about engaged in an unlawful act.*
>
> *(2) The ACAT must make 1 or more of the following orders:*
>
> *(a) that the person complained about not repeat or continue the unlawful act;*
>
> *(b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*
>
> *(c) unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.*

4. Section 53 of the HRC Act provides that 'unlawful act' means an act that is unlawful under the Discrimination Act, part 3 (Unlawful discrimination), part 5 (Sexual harassment) or part 7 (Other unlawful acts).

5. Part 3 of the Discrimination Act (Unlawful Discrimination) sets out a number of circumstances in which it is unlawful to discriminate against a person, with Division 3.1 dealing specifically with discrimination in work. Section 10 provides, amongst other things, that it is unlawful for an employer to discriminate

against a person, *inter alia*, in making arrangements for the purpose of deciding who should be offered employment, or in deciding who should be offered employment.[1]

6. The forms of discrimination to which the Discrimination Act applies are set out in Part 2 of the Discrimination Act. Section 8 of the Discrimination Act provides that a person directly discriminates against another person if the person treats or proposes to treat the other person unfavourably because the other person has one or more of the 'protected attributes' in section 7. Section 7 sets out a list of 'protected attributes', one of which is a person's sex (section 7(1)(v)).

7. Part 4 of the Discrimination Act then sets out a series of 'exceptions' to unlawful discrimination. Relevantly for these purposes, section 27 provides that:

> ***27 Measures intended to achieve equality***
>
> *(1) Part 3 does not make it unlawful to do an act if a purpose of the act is—*
>
> *(a) to ensure that members of a relevant class of people have equal opportunities with other people; or*
>
> *(b) to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class.*
>
> *(2) However, subsection (1) does not make it lawful to do an act for a purpose mentioned in that subsection if the act discriminates against a member of the relevant class in a way that is not reasonable for the achievement of that purpose.*

8. It is well established that, when interpreting the Discrimination Act, a liberal and purposive approach is generally taken to the provisions in Parts 2 and 3, a "strict, not liberal" approach is generally taken to the exceptions in Part 4, so as not to allow the exception to circumvent the underlying purpose of the legislation.[2]

9. Where there is a *prima facie* case of unlawful discrimination, section 70 of the Discrimination Act provides that the onus is on the respondent to establish that the special measures exception in section 27 applies to it.

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[1] Section 10(1)(a)-(b), *Discrimination Act 1991*

[2] *Richardson v ACT Health & Community Care Service* [2000] FCA 654 at [23]-[24] per Finkelstein J

The hearing process

10. There was no oral hearing in this matter. The parties agreed that the matter could be decided on its merits on the papers.

11. The Tribunal has relied upon the following documents as setting out the applicant's submissions:

    (a) Complaint to the Human Rights and Discrimination Commissioner and associated documentation, received 13 July 2016.
    (b) What appears to be a letter or email entitled "Dear Kezlee", setting out the applicant's position in relation to section 27 of the Discrimination Act (**section 27 email**).
    (c) Email to the tribunal registry of 8 January 2017.
    (d) Email to tribunal registry of 10 March 2017.
    (e) Email to tribunal registry of 13 April 2017.
    (f) Applicant's final submissions, received 15 May 2017.

12. At no time did the applicant attend the Tribunal or make written submissions. He submitted little in the way of factual evidence and no signed witness statement.

13. The respondent's position of the substantive matters was set out in its final submissions dated 28 April 2017. The respondent's evidence consisted of the witness statement of Mr Brown, the Chief Officer of ACTFR[3] dated 28 April 2017, to which numerous documents were annexed.

14. One of the difficulties that presents itself when a matter proceeds to hearing 'on the papers' is that there is no scope for the parties to cross examine each other's witnesses. This presented a particular problem for the respondent, who was unable to confirm the applicant's identity, assess whether the applicant participated in the 2016 Campaign, determine where he was placed in that campaign, or otherwise address his standing to bring the application. The applicant was also not unaffected, as he did not have an opportunity to critically cross examine the respondent's witness on his actual motivations in implementing the Target, and the efficiency of the 2016 Campaign. Still, the parties agreed to a hearing on the papers, and accordingly the matter had

[3] Statement of Mark Brown dated 28 April 2017 at [3]

proceeded in that manner, with the evidence of both parties being, therefore, largely uncontested. The ramifications of this, for both parties, are discussed below.

The applicant's position

15. The applicant's submissions do not clearly address each element of the legal framework established by the Discrimination Act. Still, the basis of his application is clear.

16. The applicant claims to have been a participant in the 2016 Campaign. Other than his correspondence and unsigned submissions, he has provided no probative evidence of this. Lack of evidence that he was an applicant presents a fundamental problem with the applicant's case, particularly as he now seeks damages in addition to changes to recruitment practices. Nonetheless, for the purpose of dealing with what the applicant calls the "merits" of his application, I will assume that he is male, that he was an applicant, and that he was unsuccessful.

17. The applicant claims that male candidates, including himself, were treated unfavourably in the 2016 campaign because the Target gave an unfair advantage to female applicants by giving them preference for up to half the available positions. Drawing on the figures set out in Mr Brown's statement (discussed further below) that four women made the final pool of 38 suitable candidates, the applicant submits that the consequence of the target was as follows:

> *If the final pool was down to 38 'suitable candidates', and 'equal opportunity' would mean that every candidate has an 8 in 38 (8/38) chance of achieving a position, which works out to be ~21%. However, it's interesting how those 4 women went from having an ~21% [sic] of achieving a place, to having a 100% chance, which in turn meant that the remaining 34 eligible candidates now had to vie for 4 remaining spots, and so had their chances reduced to ~11.8% of success…*

18. This unbalanced chance of being successful amounted, the applicant submits, to the "unfavourable treatment" of male applicants by reason of their sex.

19. The application of section 27 of the Discrimination Act was raised with the applicant by both the Human Rights Commission and by the respondent in its submissions. The applicant did not specifically address the application of section 27 of in his final submissions, but he did address the provision is the section 27 email to the HRC Commission as follows:

> *The Commissioner references section 27 of the Discrimination Act 1991 (the Act), including subsection 1, subsection a.:*
>
> *(1.) Part 3 does not make it unlawful to do an act if the purpose of that act is:*
> *(a) to ensure that members of the relevant class of people have equal opportunities with other people*
>
> *This is precisely the point – "equal opportunity"*
> *Sure enough, the aim is to increase the number of female firefighters, but the means being employed is via "un"equal opportunity – namely that of all applicants, females make up a minority, yet 50% of the positions on offer (8 of 16) are reserved for them – therefore it is male applicants who are being disadvantages, as the "equal opportunity" premise is being violated."*

20. Key to the applicant's position is his particular definition of 'equal opportunity'. Further to this, the applicant also made the following observation about the nature of 'equal opportunity' in his final submissions:

> *The applicant contends that the use of the equal opportunity policy by ACT Fire and rescue in the 2016 recruitment campaign was done in a discriminatory fashion, and the equal opportunity actually <u>already</u> existed prior to this recruitment campaign, i.e. Female applicants were already considered on an equal footing with male applicants, but simply had a low success rate in achieving a position as a firefighter, despite the equal opportunity to apply, equal testing protocols employed for both male and female applicants.*
>
> *All recruitment procedures prior to this one in 2016 were based on merit, and not on any political manoeuvring.*

21. In other words, the applicant contends that 'equal opportunity' means treating all applicants the same. In the applicant's submission, because male and female candidates were subject to the same testing and processes prior to the 2016 campaign, there was no need for a 'special measure' to ensure equality of opportunity, because it already existed.

22. The other limb of the applicant's response to section 27 was to suggest that the true "purpose" of the Target was not equal opportunity (which, on his submission, already existed), but "politics". To this end, he contested the credibility of some of the evidence given by Mr Brown. Although the provided no substantive evidence to contradict Mr Brown's statements, the applicant effectively argued that Mr Brown's evidence was so incredible as to be inherently unreliable, and should not be accepted.

23. The remedy sought by the applicant changed between the commencement of these proceedings and his final submissions. In his original application to the HRC, the applicant sought "…for the ACT Fire & Rescue to return to merit-based recruitment." In his final submissions, he also sought a refund of the cost of his Working with Vulnerable Persons check (**WWVP check**) and damages. However, beyond a claim to have paid an amount stated in his submissions for the WWVP check, he provided no evidence of any expenditure on either that check, or anything else, and nor did he attempt to quantify any other loss. I therefore have no evidence of any actual expenditure incurred, or damage suffered, by the applicant.

The respondent's position

24. In its submissions, the respondent raised a number of concerns about whether the applicant had, in fact, been discriminated against. For the most part, these went to the respondent's identity, whether he was actually an applicant, his standing to commence these proceedings, and other jurisdictional issues. These are obviously serious and potentially fundamental issues and the applicant ultimately did not address them in the substantive hearing. Ultimately, however, I do not need to consider those issues with any finality in this matter. Rather, as requested by the applicant, I will deal with 'the substantive issue' of whether the Target is a permissible special measure intended to achieve equality within the meaning of the term in section 27 of the Discrimination Act.

25. Section 27 of the Discrimination Act sets out a defence to unlawful discrimination. Before section 27 even becomes relevant to this case, there is a question as to whether the decision to adopt the Target and the processes of the 2016 Campaign could be considered 'unlawful discrimination'. In this regard, I do not understand the Territory to be seriously contesting the applicant's assertion that the Target may treat male candidates 'unfavourably', as per section 8(2) of the Discrimination Act. Nor do I understand the respondent to contend that a person of the male gender cannot attract protection under section 7 by reason of his being of the male sex. Therefore, I do not understand the respondent to suggest that the Target, or the processes adopted during the 2016 Campaign, are not capable of giving rise to direct discrimination in the arrangements made for the purpose of deciding who should be offered employment, contrary to section 10(1) of the Discrimination Act.

26. Rather, the respondent contends that, even if the Target does potentially give rise to a form of direct discrimination, it is not unlawful because:

> *…the ACTFR recruitment target was a special measure intended to achieve equality … under s 27 of the Discrimination Act and, pursuant to s 27 … any action taken in accordance with such a measure does not constitute unlawful discrimination under the Act.*

27. In other words, the Target is a 'special measure' to ensure that women have equal opportunities with men, and is therefore not unlawful by operation of section 27.

28. It is at this point, in considering the application of section 27 of the Discrimination Act, that the differences between the applicant's and the respondent's positions become most stark. The respondent does not dispute the applicant's contention that female applicants already had, prior to the 2016 Campaign, the kind of formal 'equality' contended for by the applicant. However, the respondent contends that the Discrimination Act calls for a much broader definition of equality:

> *…in the employment context, the pursuit of equality of opportunity under s 27 permits the provision of advances to women that are intended to address disadvantages or barriers that have resulted in women being underrepresented in a particular profession, such as firefighting.*[4]

29. The differing concepts of 'equality' are discussed further below.

30. In terms of the test to be applied in relation to section 27, the respondent cited and relied upon the decision of the ACT Supreme Court in *Richardson v ACT Health and Community Care*:

> *46. Section 27 of the Discrimination Act requires a subjective assessment of the state of mind of the party imposing the purported special measure:*
>
> > *[T]he conduct which s 27 protects is not discrimination that has the effect of achieving equality, but discrimination which is intended to have that effect. The word "purpose" refers to the actual decision-maker or actor…To determine whether discriminatory conduct is rendered lawful by the application of s 27 the act of discrimination must be for a permitted purpose. That is, the conduct which s 27 protects is not discrimination that has the effect of achieving equality, but discrimination which is intended to have that effect. The word "purpose" refers to the actual intention of the decision-maker or actor. The decision-maker's intention is a matter to be established by reference to the facts, including reference to the circumstances from which inferences may be drawn as to the state of mind of the decision-*

[4] Respondents' submissions at [61]

> *maker: compare Colyer above at 773 per Kenny JA. To determine whether the decision-maker holds the requisite state of mind, it will be permissible to enquire whether the conduct in question was capable of achieving equal opportunity (s 27(a)) or meeting special needs (s 27(b)). That enquiry may be necessary for the purpose of establishing that the claimed intention is one that is likely to have been held by the decision-maker. It is not, however, to substitute for an enquiry into the subjective state of mind of the decision-maker an objective criterion. It is merely one of the means by which a claimed subjective intention can be established, in cases where there may be doubt.*[5]
>
> *47. The subjective purpose test in Richardson has since been applied by the the ACT Discrimination Tribunal*[6] *and by its successor, this Tribunal.*[7]
>
> *48. While there is no requirement in s 27 that the purported special measure is objectively capable of achieving equal opportunity" (except insofar as this may go to the proponents intention), case law from other jurisdictions indicates that it must be reasonable for the proponent of the special measure to have concluded it will further the requisite purpose. Any assessment of the proponent's intention should be conducted broadly since s 27 does not on its face impose a reasonableness of proportionality test.*

31. In other words, to respondent submitted that to find the "purpose" of an act, the Tribunal should determine the "subjective intention of the decision-maker". The respondent submitted that, for the purposes of this matter, the evidence of Mr Brown should be accepted as the evidence of the decision-maker.

32. Mr Brown has been employed as the Chief Officer since July 2015. Prior to that he was the Assistant Commissioner with Fire and Rescue NSW. Prior to that he had been an officer with Fire and Rescue NSW for thirty years.

33. Mr Brown's evidence was that he was "closely involved with the ACTFR recruitment process in 2016, including the development and implementation of the recruitment target for women that is the subject of these proceedings."[8] He did not suggest that he was the sole decision-maker, but he was a primary player in the executive decisions that were made throughout the process of implementing the Target.

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[5] Respondent's submissions at [46], citing *Richardson and ACT Health and Community Care Service* [2000] FCA 654 at [26]

[6] *Woodbury & Ors v Australian Capital Territory* [2007] ACTDT 4 at [84]

[7] Respondent's submissions at [47]; citing *D v Commissioner for Social Housing & Ors* [2010] ACAT 62 at [142]

[8] Statement of Mark Brown dated 28 April 2017 at [6]

34. Mr Brown's evidence as to the development and implementation of the Target and the recruitment campaign may be summarised as follows:

(a) ACTFR determined to run a recruitment campaign in 2016.

(b) ACTFR "voluntarily" adopted a target of recruiting women to 50% of the 16 positions available through the 2016 campaign.[9]

(c) The recruitment process for the 2016 campaign involved "rigorous testing" in which the same standards applied to women and men in determining who was suitable for employment.[10]

(d) Those standards "were not materially different to those employed in previous recruitment rounds."[11]

(e) There was no "hard target" that reserved eight places for women – female applicants had to pass the same standards as male candidates.[12]

(f) Gender diversity in this ACTFR has historically been "extremely poor". As at 2015 women represented 2% of career firefighters in the ACTFR,[13] which was the lowest in any of the agencies comprising the Emergency Services Agency. It was also the lowest rate of representation of women among the major Australian urban firefighting services.[14]

(g) That said, all urban firefighting units have struggled "for a long time" to attract female recruits.[15]

(h) One of the difficulties in recruiting women in the past has been the perception amongst both genders that firefighting was not a realistic option for women, in part because the physical strength required.[16]

(i) Mr Brown "believe[d] that society's societal perceptions can be changed over time, for example the proportion of female police officers and

[9] Statement of Mark Brown dated 28 April 2017 at [7]
[10] Ibid at [8]
[11] Ibid at [9]
[12] Ibid at [10]
[13] Ibid at [14]
[14] Ibid at [15]
[15] Ibid at [16]
[16] Ibid at [18]

members of the Defence Force are now at a much higher level than many years ago."[17]

(j) Over the years, a number of things have changed in the firefighting industry that could change perceptions, including lighter equipment, better design of trucks, and recognition that firefighting requires attributes in addition to physical strength.[18]

(k) Despite these changes, the number of women recruited has been slow to increase.[19]

(l) ACTFR does not recruit often, so the opportunities to address gender imbalance are "relatively rare."[20] When recruitment programs run, very few women apply – during the last round in 2012 only 6.5% of applicants were female.[21] None were found suitable for employment.

(m) Following work within ACTFR, a strategy for female recruitment was developed, and a number of measures were put in place in an attempt to attract women. Including a "Women in Emergency Services" Strategy, which was formally launched by the Minister for Police and Emergency Services on 4 December 2015.[22] The strategy included information sessions and a social media campaign to "…send a concrete signal to the community that firefighting is a viable career for women" and to encourage more women to apply.[23]

(n) Following this process, the Commissioner of Emergency Services Agency, Mr Dominic Lane, wrote to the Commissioner for Public Administration, Ms Overton-Clarke, sought agreement for an Equal Opportunity Program (**EEO**) to support targeted recruitment of women and people from linguistically and culturally diverse backgrounds. This EEO program was approved in 10 November 2015.

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[17] Ibid at [19]
[18] Ibid at [20]
[19] Ibid at [21]
[20] Ibid at [22]
[21] Ibid at [25]
[22] Ibid at [34]
[23] Ibid at [38]

(o) The 2016 campaign was opened on 1 February 2016 and closed on 15 February 2016. Sixteen positions were available. Thirty eight applicants were found suitable. Offers were made to four female candidates and twelve male candidates. A merit list of 22 male candidates was established.

(p) Although the Program did not ultimately achieve its target of offering eight positions to suitable female applicants he considered the initiative to be a success in the effort to improve gender diversity in the organisation and reduce the barriers traditionally faced by women. He noted that 25% of new recruits were women, compared to 0% in 2012, and around three times as many women relative to men applied in the latest round, compared to 2012.

35. The respondent submitted that Mr Brown's evidence demonstrated that he, at least, believed that the subjective purpose of the Target was to ensure women have equal opportunities to employment in ACTFR, and that as he was the relevant executive decision-maker, the requirements of section 27(1) were met.

36. The respondent did not make any submissions about the effect of subsection 27(2).

Some preliminary comments - the role of the Tribunal

37. The applicant's submissions are strongly worded, with many references to such concepts as "unfairness"[24], "merit", "politics" and "the good of the community".[25] It is apparent that he strongly objects to the Target, and indeed considers it a bad policy that may present some risk to public safety and even human life.[26] He feels strongly that he has been subjected to unfairness – lamenting that there is "no special protection or me" and that the barriers to his entry into the ACTFR, always high, have now "doubled".[27] At the heart of is a sense of injustice or unfairness, and an understandable desire for a remedy.

38. It is therefore important to set out the limited role of the Tribunal in proceedings under the Discrimination Act.

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[24] HRC complaint
[25] Email to registry of 8 January 2017
[26] Albeit he does not cite any evidence
[27] Submissions at [38]

39. The Discrimination Act, and the HRC Act, establish a framework in which certain individuals, with identified 'protected attributes', can seek redress for 'discrimination' (as defined in the Act) that occurs in prescribed circumstances. The Discrimination Act only provides for remedies where these threshold requirements are met such that an act becomes unlawful. The Tribunal's role under the Discrimination Act is simply to determine whether the action complained of amounts to unlawful discrimination, as defined in that Act.

40. In exercising its role under the Discrimination Act, the Tribunal does not act as some kind of de facto 'house of review' or policy decider, oversighting the decisions of the Government or its agencies, searching for errors, or 'unfairness' or assessing or substituting other outcomes the Tribunal may think are preferable. In considering whether an act amounts to unlawful discrimination, the Tribunal does not need to consider whether the act was good or bad policy, the best available option, or even at all effective. It does not consider whether something is, objectively or subjectively, 'fair'. Indeed, the Tribunal would be in error were it to approach a complaint referred to it such a way.[28]

41. The position under the Discrimination Act may be contrasted with, for example, the Tribunal's role in the administrative review jurisdiction. In that jurisdiction, the Tribunal has the power, under certain pieces of legislation, to stand in the shoes of the decision-maker, consider whether the 'correct or preferable' decision has been, and, if it has not been, remake the decision so that it is both the correct decision under law, and the preferable decision in the circumstances.[29] The Discrimination Act does not allow for some broader 'merits review' of this kind. Rather, it merely requires the Tribunal to findings of fact, and consider those facts against the law.

42. The facts having been set out above, it is not to the law we must turn.

What does section 27 of the Discrimination Act require?

43. Section 27 of the Discrimination Act is entitled "measures intended to achieve equality". Notwithstanding the other provisions of the Act, section 27 effectively

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[28] Unless, of course, the evidence demonstrated that the scheme were so irrational or ineffective as to cast doubt on the stated real purpose of the scheme

[29] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [589] per Bowen CJ, Deane JJ, *Shi v Migration Agents Registration Authority (*2008) 248 ALR 390 at [134]

permits an act that may otherwise be unlawful under the act, where *a* purpose of that act is to give members of a relevant class 'equal opportunities'.[30] Note that the use of the word 'a' suggests that equal opportunities need not be the *only* purpose.

44. But what is an 'equal opportunity'?

45. The term 'equal' has many potential meanings, and it is apparent that differing conceptions of 'equality' are at the heart of the dispute in this matter.

46. The term 'equal' is not defined in the Discrimination Act. Looking to the *Macquarie Dictionary*, the 'plain English meaning' of 'equal' is as follows:

> *adjective* ***1.*** *(sometimes followed by to or with) as great as; matching: the velocity of sound is not equal to that of light.*
>
> ***2.*** *like or alike in quantity, degree, value, etc.; of the same rank, ability, merit, etc.*
>
> ***3.*** *evenly proportioned or balanced: an equal mixture; an equal contest.*
>
> ***4.*** *uniform in operation or effect: equal laws.*
>
> ***5.*** *level, as a plain.*

47. Meanwhile, 'equality' is defined as:

> *noun (*plural ***equalities****)*
> ***1.*** *the state of being equal; correspondence in quality, degree, value, rank, ability, etc.*

48. On one level, these definitions seem straightforward enough - "like or alike", "matching", "of the same…." or "corresponding". On another level, however, different conceptions of what these things look like in practice have been at the heart of social and political discourse for some time.

49. The applicant contends for a definition of 'equality' that equates "ensuring that members of a relevant class have equal opportunities with other people" with ensuring that everyone starts from the same place and is treated exactly the same – that is, the elimination of both artificial barriers and assistance. In the context of this matter, formal equality would mean that every applicant for a position in the ACTFR should be given an equal opportunity to compete for a position,

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[30] Section 27(1)(a), *Discrimination Act 1991*

absent any kind of preference, adjustment or special treatment. All applicants would need to meet the same testing standards, and those standards would need to be rationally and relevantly related to the position. If more than one person were suitable for the position, the offers would be made to persons in the order of their ranking, in relation to the attributes considered desirable. This concept of equality of opportunity, the applicant contends, already exists in ACTFR, as there are neither formal laws against female employment, and nor are the physical tests or requirements irrelevant or arbitrary barriers to their employment. This kind of equality is commonly called "formal equality" – that is, the absence of any distinction in treatment between persons of a relevant class and other persons

50. The respondent, by contrast, submits that equality of opportunity "must permit something more than formal equality."[31] Equality, the respondent contends, must allow for processes and procedures that "address underlying substantive inequalities that persist despite formal equality." This kind of equality is commonly called 'substantive equality'. Proponents of substantive equality contend that persons of relevant classes may need to be treated differently so that they can, in the end, enjoy their human rights equally.[32]

51. Again, before proceeding further, it is necessary to be clear about the role of the Tribunal in this proceedings. It is not the role of the Tribunal to delve into this philosophical debate or opine about which interpretation of 'equality' is preferable from a policy perspective. Making that kind of decision is the role of politicians. The role of the Tribunal is to work of what 'equal' and 'equal opportunities' mean in the context of the Discrimination Act.

52. That question is: did the drafters of the Act intend that 'equality of opportunity' be limited to formal equality, or extend to encompass a broader concept of 'substantive equality'?

53. When interpreting a provision in a statute, the first interpretative tool is the language of the provision in issue, read in the context of the Act as a whole.[33] On a textual analysis of section 27, I accept the respondent's arguments about the kind of 'equality' it is intended to facilitate. The purpose of the provision is

[31] Respondent's submission dated 26 April 2017 at [51], line 6
[32] See HREOC: https://www.humanrights.gov.au/guide-law-special-measures
[33] *Legislation Act 2001* section 140

clearly, on its face, to permit the enactment of a 'special measures' to address the 'special needs' of persons with relevant protected attributes. I agree with the respondent that in order for this provision to have work to do, and to not be devoid of meaning or effect, it must mean more than the elimination of formal discrimination.[34] It must permit the implementation of some 'special' measure.

54. But how far does it go?

55. In working out the meaning of an Act, material not forming part of the Act may be considered.[35] The starting point when considering extraneous material is usually the explanatory statement for the relevant bill – which in this case was the *Explanatory Statement to the Human Rights and Equal Opportunity Bill 1991*, the Bill that became the *Discrimination Act 1991*.

56. The original purpose of the clause that preceded section 27 was set out in the *Explanatory Statement to the Human Rights and Equal Opportunity Bill 1991*, as follows:

> *Measures intended to ensure that people who are covered by one of the grounds in Part II of the Bill are given equal opportunities, or to provide access to facilities, services or opportunities to meet their special needs are not unlawful discrimination. Employing a person in accord with an affirmative action program, for example, will not be unlawful.*

57. The term 'affirmative action program' is not defined in the Discrimination Act, but may be understood in its common meaning as "an action designed to provide increased employment opportunities for groups who have previously suffered from discrimination, especially women and minority racial group."[36] Affirmative action policies are inherently a means of advancing substantive equality.

58. Another source of information about the purpose behind an Act is the presentation speech to the Legislative Assembly for the introduction of the Bill. In introducing the *Human Rights and Equal Opportunity Bill 1991* in 1991, the then Chief Minister, Ms Follet, did not address section 27 specifically, but she did set the context of the Act as a whole as follows:

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[34] Submissions at [51]
[35] *Legislation Act 2001* section 141
[36] Macquarie Dictionary

> *The principal objects of the Bill are set out in Part I. They are: To eliminate, so far as possible, discrimination in employment, education and a range of other areas; to eliminate, so far as possible, sexual harassment in those areas; to promote recognition and acceptance within the community of the equality of men and women; and to promote recognition and acceptance within the community of the principle of equality of opportunity for all persons.*
>
> *In order to reflect more clearly these policy objectives and to stress the positive concepts which lie at the base of the legislation, we have changed the name of the Bill from "Discrimination" to "Human Rights and Equal Opportunity". It is important to emphasise that this legislation is intended to protect the rights of those who are disadvantaged in our society, including women, people with disabilities and members of ethnic minority groups, and to ensure that they are offered equal opportunity to participate freely in the community.*

59. As should be evident from the above extracts, both the text of the Discrimination Act and the extraneous material make it abundantly clear that the purpose of both the Discrimination Act generally, and section 27 in particular, was to allow and indeed advance substantive equality.

60. The applicant has pointed to no law, submission or interpretative analysis that would permit the Tribunal to take another interpretation. Accordingly, I accept the submissions of the respondent that the concept of 'equality of opportunity' in the Discrimination Act encompasses more than mere formal equality, and that section 27 is designed to permit processes to remove or address disadvantages or barriers – that is, that it permits special measures intended to achieve substantive equality.

The first limb of the test – the 'purpose' of the Target

61. The decision of Supreme Court in makes it clear that section 27(1) requires the Tribunal to consider the "actual intention of the decision-maker."[37] The intention of the decision maker is a fact to be determined on the balance of probabilities, having regard to all the evidence.[38]

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[37] *Richardson* at [26]

[38] See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay and Another* (2012) 248 CLR 500 (***Barclay***), per French CJ and Crennan at [44] – the decision is in the different context of adverse action under the *Fair Work Act 2009*, which is primarily concerned with whether a person has acted for a prohibited reason, rather than whether they are acting for a permissible purpose. However the reasoning provides a useful analysis of what must be considered in determining an actor's 'reasons'

62. 'Actual intention' is a subjective test – the question is whether the decision maker held a requisite state of mind. Direct evidence of a decision maker that is accepted as reliable may well discharge the burden. However, the respondent noted, fairly, that in other jurisdictions at least, case law imposes a test of reasonableness, requiring that it must have been reasonable for the proponent of the special measure to have concluded it would further the requisite purpose.[39] I do not need to decide the precise legal point with any certainty in this proceeding[40], but it must clearly be the case that where a decision-maker's stated reasons are disproportionate or nonsensical, that may, if nothing else, throw some doubt on whether the decision-maker really did have the necessary state of mind.

63. With that in mind, the question in this case is: *did the decision-maker implement the Target and the 2016 campaign processes in the belief that they were capable of ensuring women had equal opportunities to be firefighters?*

64. The respondent relied upon Mr Brown's evidence as the evidence of the decision-maker. In his witness statement, Mr Brown set out what he believes was the purpose of the Target and the reasons for the 2016 Campaign. It appears from his statement that Mr Brown was only one decision maker in a process, although as the Chief Officer of the ACTFR it is readily apparent that he would have had a significant influence and role in any decision making process. The applicant did not challenge the respondent's reliance upon the evidence of Mr Brown – again, this may have been one of the evidentiary consequences of a 'hearing on the papers'. In the circumstances. Mr Brown's evidence is the best evidence of the intention of any person involved in the decision making process, and I accept his evidence as being evidence of the relevant decision maker.

65. The applicant provided no credible contrary evidence of the intention of the relevant decision-makers. Instead, the applicant's position amounts to a suggestion that Mr Brown's evidence was so incredible that it could not be accepted. Given how unreasonable the policy was, the applicant submitted, the only explanation for it is "political manoeuvring"[41]. What end that manoeuvring

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[39] *Barclay* at [42] per French CJ and Crennan J, and [101] per Gummow and Hayne JJ. *; Richardson* at [23]

[40] Even if a test of 'reasonableness' applies, I have no reason to doubt that Mr Brown's largely unchallenged evidence meets it

[41] Applicant's final submissions dated 15 May 2017 at [6]

was aimed at the applicant did not specify, although it may perhaps be supposed that he is alleging that Mr Brown was doing the bidding of politicians, rather than genuinely turning his mind to whether the Target would enhance equality of opportunity. Given the matter was heard on the papers, the applicant was not able to put this directly to Mr Brown. He offered no further evidence in support of this submission.

66. The legal onus and evidentiary burden of establishing that section 27 of the Discrimination Act applies lies with the respondent. However, once the respondent has produced evidence sufficient to meet that burden, if the applicant wishes to discredit that evidence, he has his own evidentiary burden to meet. In this case, the applicant has provided no evidence to substantiate his suggestions or assertions, which are in any case made in the form of submissions. He did not seek to cross examine Mr Brown and made his own forensic decision not to attend the Tribunal and to have a hearing on the papers. The Tribunal is required to be flexible and informal, and some latitude may be shown to self-represented litigants, but an applicant who seeks to discredit a witness must rely on more than a mere assertion of error or ulterior motive. The applicant has failed to do this, and therefore I have no reason to doubt the evidence of Mr Brown.

67. Consequently, I accept the evidence of Mr Brown that the quota was voluntarily adopted by the ACTFR as a mean of achieving equality, and not imposed from 'on high' by somebody else with an ulterior motive. I accept that Mr Brown, and the relevant executives within the ACTFR and the ACT Government, considered it a desirable thing to increase diversity within ACTFR. I accept that Mr Brown thought the Target and the procedures adopted for the 2016 Campaign would assist to do so. That there may have been other purposes for the adoption of the Target, including, for example, enhancing the reputation of the fire service amongst some sections of the communities ('politics', as the respondent terms it), is not to the point. A policy can have many goals, and usually does. For the purposes of section 27(1) of the Discrimination Act, I need only be satisfied that *a* purpose of the Target was to ensure women have substantively equal opportunities, and I am so satisfied.

68. I note for completeness that, even if I am required to decide that Mr Brown must have reasonably held the view that the Target would ensure substantively equal

opportunities (or not unreasonably held that view), I am so satisfied. His evidence as to his reasoning was well set out, not illogical or irrational, and, in any case, was not tested.

The 'reasonableness' issue

69. Section 27(1) of the Discrimination Act is only the first part of the test in relation to whether an act amounts to a special measure. A second limb of the test is imposed by section 27(2). This subsection amounts to a limited 'exception to the exception'. It provides that 27(1) will not make it lawful do an act for one of the purposes in section 27(1) (for example to ensure members of a relevant class of people have equal opportunities) if the act discriminates against a member of 'the relevant class' in a way that is not reasonable for the achievement of that purpose.

70. The respondent did not directly address the operation of this provision, or its consequences for these proceedings. Nonetheless, for completeness, it is worth setting out the background of to this second limb of the test.

71. The original version of section 27(2) was inserted into the Discrimination Act by the *Discrimination Amendment Act (No 2) 1999* (**1999 Bill**). The wording in the Bill differs slightly to the wording of the current provision, in that it stated:

> *(2) However, subsection (1) does not make it lawful to do an act for a purpose mentioned in that subsection if the act discriminates against a member of the relevant class in a way that is irrelevant to the achievement of that purpose.*

72. The Explanatory Memorandum to the 1999 Bill expressly provided that the purpose of this amendment was to:

> *... make it clear that it will not be lawful to discriminate on irrelevant grounds. It is intended to ensure that a service provider could not refuse a person access to a special facility, or special services designed to suit their needs, because, for example, of their religion or sex if that were an irrelevant consideration for the purpose of providing the service*
>
> *... allow people within a disadvantaged group to take action against a service provider if they are treated unfavourably in the course of the provision of a special measures program, in a way that is irrelevant to achieving the purposes of that special measure, and enable them to avail themselves of the remedies under the Act*

73. Section 27 was later amended by the *Discrimination Amendments Act 2004*, which substituted a slight different wording in section 27(1), and a different section 27(2). The explanatory memorandum for this amendment provided that:

> *The purpose of this Bill is to clarify the operation of Section 27 of the Discrimination Act 1991 relating to special measures. In particular, the Bill ensures that measures that are put in place to assist disadvantaged groups are protected from legal challenge by people not intended to benefit from them, without protecting any negative discrimination in the administration of those measures.*
>
> *…*
>
> *A test for reasonableness substitutes the relevance test in section 27(2). An act that discriminates against a member of the relevant class will be unlawful if it does so in a way that is not reasonable for achieving the aims in section 27(1)(a) and (b). Whether a discriminatory act is reasonable depends on whether it is proportionate to achieve a legitimate aim. Proportionality requires that the difference in treatment be necessary and rationally connected to the objective; the least restrictive to achieve the object; and not have a disproportionately severe effect on the person to whom it applies.*

74. The purpose of section 27(2) is clear. This subsection imposes a reasonableness test on special measures implemented under section 27(1), but that reasonableness test *only* operates where a 'special measure' has a double effect – that is, where it operates in such a way that a person who is intended to benefit from the special measure is otherwise discriminated against in a way that is not reasonable. Consequently, in the context of this matter, the proportionality and reasonableness test only operates where the Target or the 2016 Campaign operate in such a way that the treat a woman unfavourably because she has another protected attribute. It is of no benefit to the applicant.

Conclusion

75. As set out above, it is not the role of the Tribunal to determine whether Target and the 2016 Campaign were good policy, effective policy, or even whether there are negative consequences that outweigh the positive. Rather, the role of the tribunal is to consider whether these things are "special measures" covered by section 27 of the Discrimination Act. This requires that I be satisfied that Mr Brown reasonably believed that the Target, and its implementation through the 2016 Campaign, would achieve its goal of enhancing equal opportunity for women. I am so satisfied. Accordingly, whatever the merits of these processes or their unfavourable effect on the applicant, they are 'special measures' that meet

the requirements of section 27 of the Discrimination Act and are therefore not unlawful. As such, the application must be dismissed.

……..
Senior Member H Robinson

HEARING DETAILS

FILE NUMBER:	DT 10/2016
PARTIES, APPLICANT:	Phil Macca
PARTIES, RESPONDENT:	Australian Capital Territory Represented by Emergency Services Authority
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Senior Member H Robinson
DATES OF HEARING:	N/A