



NTCAT

Northern Territory
Civil and Administrative Tribunal

NORTHERN TERRITORY OF AUSTRALIA
Anti-Discrimination Act 1992

File No: 2021-00966-CT

ORDER

IN THE CIVIL AND ADMINISTRATIVE TRIBUNAL

BETWEEN

MAGAN TRAINOR

APPLICANT

BY LITIGATION GUARDIAN JAXON BAKKER

AND

GOODSTART EARLY LEARNING LIMITED

RESPONDENT

PRESIDING MEMBER:

ROBERT PERRY

DATE MADE:

12 NOVEMBER 2021

HEARING TYPE:

HEARING

THE TRIBUNAL ORDERS THAT:

1. The application is dismissed.
2. No order as to costs.

DATED: 12 November 2021



BY THE TRIBUNAL
E. Faulter
DELEGATE OF REGISTRAR



NTCAT

Northern Territory
Civil and Administrative Tribunal

CITATION: *Trainor v Goodstart Early Learning Limited*

PARTIES: MAGAN TRAINOR
APPLICANT
v
GOODSTART EARLY LEARNING LIMITED
RESPONDENT

MATTER TYPE: Original Jurisdiction - *Anti-Discrimination Act 1992*

FILE NO: 2021-00966-CT

HEARING DATE: 14 OCTOBER 2021

DECISION OF: ROBERT PERRY

DATE OF ORDERS: 12 NOVEMBER 2021

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Magan Trainor (by telephone)

RESPONDENT: Salva Marsh of counsel (by video link)
Melissa Dawber, in-house counsel, Goodstart Early Learning Limited (by video link)

INTERVENOR: Tracey Keys, Anti-Discrimination Commission

REASONS FOR DECISION:

1. This matter was referred to the Northern Territory Civil and Administrative Tribunal (the Tribunal) by the Anti-Discrimination Commission (the Commission) pursuant to section 86 of the *Anti-Discrimination Act 1992* (the Act) to determine whether the respondent had engaged in prohibited conduct pursuant to section 24 of the Act, in that it failed to accommodate a special need arising from the attributes of race and/or religious belief or activity in the provision of goods, services and facilities and /or the area of education.

2. The original application to the Anti-Discrimination Commission was made by Ms Magan Trainor, the mother of Jaxon Bakker, who is an infant child. I will refer to Jaxon Bakker as “Jaxon” in these reasons. Ms Trainor is representing her child as his litigation guardian.
3. The matter that is the subject of the complaint by Ms Trainor on behalf of Jaxon is that Ms Trainor says the respondent has acted unreasonably by refusing to allow him to wear what has been called a “Pounamu” or “greenstone” when Jaxon is in the respondent’s care during periods known as “sleep/rest time”, when the infant is laid down in a cot or on a mattress for that period of rest/sleep. The Pounamu is normally worn around the neck, attached to a leather strap necklace that is tied at the back.

Background to the complaint

4. The background to this matter is well set out in the Evaluation Decision of the Commission dated 13 April 2021 and I paraphrase those background facts (which are not in dispute) as follows:

Jaxon was at that time 16 months old, is of New Zealand/Maori heritage and is being raised under the Ratan (Maori/Christian) religion. At a very early point in Jaxon’s life, he was gifted a carved Pounamu from a family member and the continuous wearing of the Pounamu is of religious and cultural importance as it offers protection and good luck to the wearer. The religious and cultural belief is that the wearer is exposed to bad luck if the Pounamu is removed from the bearer’s body.

Jaxon had been attending day care at the respondent’s Palmerston centre for some months prior to 15 January 2021 and he had been allowed to wear the Pounamu for the whole of each care period during that time, including sleep time, however on 12 January 2021 Ms Trainor received an email from the respondent advising that after a review of its policies and procedures, it had been determined that as from 15 January 2021, infants would not be allowed to wear necklaces when engaging in rest/sleep time and that this would include Jaxon’s Pounamu.

The new policy was titled “NQS2 Sleep, Rest and Relaxation Requirement”. Ms Trainor objected to the policy as it related to Jaxon and says that by implementing it against her will, the respondent has failed to accommodate a special need of Jaxon’s based on his race and/or religious belief or activity.

Legislation

5. There are a number of sections of the Act relevant to this matter as follows:

Part 3 Discrimination

Division 1 Prohibited grounds of discrimination

19 Prohibition of discrimination

- (1) *Subject to subsection (2), a person shall not discriminate against another person on*

the ground of any of the following attributes:

- (a) race;....*
- (m) religious belief or activity;....*
- (2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.*

24 Failure to accommodate special need

- (1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.*
- (2) For the purposes of subsection (1):*
 - (a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and*
 - (b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.*
- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:*
 - (a) the nature of the special need; and*
 - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and*
 - (c) the financial circumstances of the person; and*
 - (d) the disruption that accommodating the special need may cause; and*
 - (e) the nature of any benefit or detriment to all persons concerned.*

53 Acts done in compliance with legislation, &c.

Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by:

- (a) an Act or regulation of the Territory; or*
- (b) an Act or regulation of the Commonwealth; or*

58 Accommodating special need unreasonable

- (1) A person may discriminate against another person who has a special need with respect to a matter that is otherwise prohibited under this Act if:*
 - (a) the other person would require special services or facilities; and*
 - (b) it is unreasonable to require the person to supply the special services or facilities.*
- (2) Whether it is unreasonable to require a person to supply special services or facilities depends on the relevant circumstances of the case including, but not limited to:*
 - (a) the nature of the special services or facilities; and*
 - (b) the cost of providing the special services or facilities and the number of people*

- who would benefit or be disadvantaged; and*
- (c) the financial circumstances of the person; and*
 - (d) the disruption that providing the special services or facilities may cause; and*
 - (e) the nature of any benefit or detriment to all persons concerned.*

Hearing

6. The matter came before this Tribunal on 14 October 2021. The parties had filed evidence and written submissions they sought to rely on at the hearing. The Commissioner, as intervener, provided background material and written submissions to inform the Tribunal of the operation of the Act.
7. Ms Trainor made limited oral submissions at the hearing, stating she was content to rely on the material she had filed with the Tribunal. The respondent, through counsel, made oral submissions as to the respondent's position and reasons for the actions it had taken in not allowing Jaxon to wear the Pounamu as and from 15 January 2021. Ms Keys for the Commissioner also made oral submissions as to how the Tribunal should consider the material filed by the parties in coming to a determination of the matter.
8. I have considered the applicant's written submissions in support of the application, referred to as Appendixes A to E under the heading "Evidence Summary – NTCAT". Appendixes (submissions) A to D are in my view not relevant to the matter that I am required to determine. They are complaints against practices and procedures adopted by the respondent rather than submissions as to the applicant's right to wear his Pounamu at all times when in the care of the respondent.
9. The submission at Appendix E is on point. That submission refers to section 53 of the Act and an exception to that provision where an act is necessary to comply with, or is specifically authorised by, an act or regulation of with er the Northern Territory or of the Commonwealth of Australia.
10. The applicant submits that the report that prompted a change in the respondent's policy that affected Jaxon's right to wear his Pounamu when he was sleeping in the care of the respondent was not mandatory and was only encouraging of the respondent to review its policies and procedures. The applicant says this was not a mandatory requirement.
11. The respondent submits it was obligated to alter its policy regarding infants wearing necklaces during rest/sleep periods after one of its childcare facilities in South Australia had been the subject of an audit by the Australian Children's Education & Care Quality Authority (the Authority). Of particular concern to the respondent was a finding by the Authority that Standard 2.2.1 had not been met at the time of the audit. Standard 2.2.1 requires "At all times, reasonable precautions and adequate supervision ensure children are protected from harm and hazard". The Authority determined in this regard that:

Policies and procedures are in place to guide educators (sic) practices to ensure each child's safety is promoted. However, the service's sleep and rest policy does not support best practice recommendations. The service QIP stated that 'Children with cultural necklaces have different sleep checks in all age groups to ensure they are kept safe which include additional checks such as hands on chest and educators placing their face near the child's face to ensure they are breathing and the necklace is not tangled. After consulting with Goodstart's Health and Safety, Quality and Inclusion departments, as well as the Department of Education and Child Development, we now perform 5-minute sleep checks on these children and request a letter from the family stating it is non-removable jewellery of a cultural or religious significance. In the January 2020 newsletter, we placed an article on our approach to sleep and rest for our parents to read'. While the service's approach is in response to their strong desire to support family's cultural beliefs and wishes, this is contradictory to information presented on the ACECQA website which clearly states:

o Policies and procedures should be based on current research and recommended evidence-based principles and guidelines. Red Nose (formerly SIDS and Kids) is considered the recognised national authority on safe sleeping practices for infants and children. Services should consult with families about their child's individual needs and be sensitive to different values and parenting beliefs, cultural or otherwise, associated with sleep and rest. If a family's beliefs and requests are in conflict with current recommended evidence-based guidelines, the service will need to determine if there are exceptional circumstances that allow for alternate practices. For example, with some rare medical conditions, it may be necessary for a baby to sleep on his or her stomach or side, which is contrary to Red Nose recommendations. It is expected that in this scenario the service would only endorse the practice, with the written support of the baby's medical practitioner. The service may also consider undertaking a risk assessment and implementing risk minimisation plans for the baby. In other circumstances, nominated supervisors and educators would not be expected to endorse practices requested by a family, if they differ with Red Nose recommendations.

o Current recommended evidence-based practices: Do not place anything (e.g. amber teething necklaces) around the neck of a sleeping child. The use of teething bracelets (e.g. amber teething bracelets) is also not recommended while a child sleeps (emphasis mine).

12. The respondent also provided a report from Professor Jeanine Young dated 24 September 2021 in which, after significant analysis, she made a number of recommendations including that “*the removal of necklaces (teething and cultural) for sleep should remain as a clearly stated strategy to reduce the risk of strangulation and choking in Safe Sleep and Rest policies*”.

13. The respondent, through counsel, provided detailed written submissions in defence of its adoption of the revised sleep and rest policy. Regarding the principles set out in the Act to which the respondent must comply, counsel submits that insofar as religious freedom is to be accommodated by a service supplier such as the respondent, the finding in *R v Chaarni (Ruling 1) [2018] VSC 387* that “Australia is obviously a multicultural society and I agree that religious dress should be accommodated as much as possible, but the right of religious freedom [is] not absolute” should be persuasive in this matter.
14. The respondent made a further submission, referencing Southwood J in the matter of *Wilson v Brown [2015] NTSC 89* regarding the requirement to make accommodations under the act is also not absolute and is to be read by reference to subsections (2) and (3) of section 24.
15. Finally, the respondent submits that views expressed in *Purvis v State of New South Wales (Dept of Education and Training) (2003) 217 CLR @ 121* that certain categories of discrimination will require more in the way of “affirmative action” than equal treatment, however precisely how much “more” is required is to be considered in all of the circumstances of the case is also of significant relevance to this matter.
16. Regarding the current matter, the respondent submits there has been no “unreasonable failure” to accommodate Jaxon’s needs within s.24 of the Act. The respondent says the change in its sleep and rest policy was an elevation of its primary goal of child safety at its centres to the level of “risk elimination” and that it was both appropriate and necessary to do so.
17. The respondent further submits that giving a total accommodation of Jaxon’s special need in light of current regulatory standards and obligations would mean it would incur significant financial costs through additional staffing requirements to supervise Jaxon when at rest and/or sleeping and that cost is a relevant factor when considering sections 24 and 58(2)(b) of the Act.
18. Further submissions by the respondent are that it has and continues to explore other options whereby Jaxon may wear his Pounamu whilst at rest/sleeping; that it has regulatory obligations under the relevant National Regulations and faces significant penalty consequences for non-compliance; and that regardless of whether it has been established by the applicant that there are other centres that would accommodate Jaxon’s wants (which is denied), the respondent’s change to its sleep/rest period procedure is in line with local level decision-making principles as espoused in the case of *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School [2006] UKHL 15* (per Lord Hoffman at para 62 – 64).

Determination

19. There are up to three steps available to determine the merits of the complaint. Firstly, I must consider the provisions of section 24, having regard to the requirements of sub-sections (2) and (3); secondly, if I find the

respondent has run foul of its section 24 obligations, I must consider section 58 and whether the accommodation of the special need would be unreasonable in the circumstances; thirdly, if I find the accommodation would not be unreasonable under section 58, I must then turn my mind to the provisions of section 53 and whether the actions of the respondent were necessary to comply with an Act or regulation of either the Territory or the Commonwealth.

20. For the reasons set out below, I have found it unnecessary to go past section 24 in finding in favour of the respondent in this matter.
21. Firstly, as a preliminary step, I am satisfied that the applicant has a religious belief or activity that requires a special accommodation – that is, that Jaxon is a follower of a recognised religion that has a custom whereby followers who are gifted a Pounamu are required to always wear the stone – awake and asleep.
22. I also find that the respondent has denied the applicant the need to wear the stone whilst at rest and/or asleep whilst in its care from 15 January 2021 and that this amounts *prima facie* to discrimination and a failure to accommodate a special need pursuant to section 24 of the Act.
23. However, for the reasons that follow, I find the actions of the respondent in refusing to accommodate Jaxon’s special need was not unreasonable when taking into consideration that matters set out at section 24(3) of the Act.
24. The respondent has produced compelling evidence and submissions that in my view precludes any finding that the failure to provide for the identified special need in this matter is unreasonable. In coming to that conclusion, I make the following findings:
 - i. Whilst Jaxon’s special need is based on religious belief, its nature cannot in my view overcome the overriding concern of his health and wellbeing and the respondent’s statutory obligations in that regard.
 - ii. I am satisfied the cost of accommodating the special need would be of benefit to Jaxon only, whereas the repercussion is likely that the additional costs involved would be passed on to all clients of the respondent’s Palmerston centre.
 - iii. The financial burden that meeting the applicant’s need in taking on further staff would be onerous and unreasonable in all the circumstances.
 - iv. There would unlikely be any disruption to other children at the clinic.
 - v. There would be no benefit to other children at the clinic, however there would likely be a detriment to other clients through increased care costs, which is also likely to put the viability of the centre at risk and therefore have a significant detriment to the respondent.

25. If I am wrong in finding that the respondent has failed in its obligations under section 24 for the reasons stated above, I am satisfied that the respondent would need to provide special services to Jaxon in providing one-on-one supervision for the sleep/rest period(s) he is in the respondent's care and that for the same reasons set out under paragraph 24 above, it would be unreasonable for the respondent to supply those special services.
26. Finally, for completion and to address the submission of the applicant at Annexure E set out above, it is evident to me that the respondent has amended its policy in regards to the wearing of necklaces by infants when at rest/asleep in accordance with regulatory requirements imposed by the Commonwealth.
27. For all of the above reasons, I find the respondent has acted reasonably and has not breached its obligations to the applicant under the Act.
28. I therefore order the application is dismissed.
29. I make no order as to costs.

DATED: 12 November 2021

ROBERT PERRY

TRIBUNAL MEMBER