

Case Notes

Religious Schools and Equal Opportunity: Lessons from *Goldberg v Korsunski Carmel School*

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The decision of the Equal Opportunity Tribunal of Western Australia in *Goldberg v G Korsunski Carmel School*, delivered on 14th September 1999 by the President of the Tribunal, Mr Nicholas Hasluck QC (now Justice Hasluck of the Supreme Court of Western Australia), was a significant one for schools which are established for religious purposes (1). A provision contained in the Equal Opportunity Act (WA) allows such schools to discriminate in favour of members of that particular religion or creed, as long as the discrimination is in 'good faith'. The decision of the Tribunal reinforces the fact that 'good faith' means acting in a way that is generally in accordance with the practices or beliefs of that religion or creed and that it is not incumbent on the school to justify those practices or beliefs to the outside world.

Background

The G Korsunski Carmel School (Carmel School) is a private school in Perth, Western Australia. The school was established in order to provide local Orthodox Jewish children with an Orthodox Jewish education. In February 1996 the parents of Gregory Goldberg sought to enrol their son in the school.

The members of the Goldberg family were adherents of Reform Judaism. Gregory's mother, Helen Goldberg, was not born into a Jewish family and had not converted to Judaism by a conversion process acceptable to the Orthodox Jewish faith. Judaism is matrilineal, so it is the Jewish status of the mother only that is relevant in determining the Jewish status of the child. As Helen Goldberg was not considered to be Jewish according to Orthodox Jewish law or *halacha* (2), neither, therefore was Gregory. He was accepted into Carmel School but a number of restrictions were placed on him, in accordance with Carmel's policy in relation to students they did not regard as Jewish (3).

Complainant Gary Goldberg, father of Gregory Goldberg and acting as his son's next friend in the case, contended that the restrictions placed on his son's attendance at Carmel School constituted discrimination against his son on the grounds of religious conviction, race and family status contrary to provisions of the Equal Opportunity Act 1984 (WA).

Anti-Discrimination Legislation

The Equal Opportunity Act 1984 (WA) makes it unlawful for an educational authority to discriminate against a person on the grounds of family status, race or religious conviction. (ss 35 I, 44 and 61 respectively).

S 73 (3) of the Act provides that nothing in the Act makes it unlawful for a person to discriminate against another person on any of the grounds in the Act, with the exception of race, impairment or age, in the case of an educational institution which is established in accordance with particular religions if the institution discriminates 'in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed'.

S 71 of the Act provides that nothing in the Act renders it unlawful for a voluntary body to discriminate against a person ... in connection with the provision of benefits, facilities or services to members of the body.

Judaism

According to Jewish belief, the oral Torah was given by God to Moses along with the written Torah. The oral law was intended to expand on the written Torah and make it applicable to everyday situations. The oral law was handed down through the generations until Rabbi Judah the Prince had the oral law written as the Mishnah. Rabbis in the early centuries of the first millennium discussed and explained the Mishnah. These discussions make up the Gemorrah. Mishnah and Gemorrah together make up the Talmud. Debates of the Talmud were resolved into various codifications and this constitutes *halacha*. Jewish law or *halacha* includes everything that regulates human conduct - all aspects of Jewish life are subject to *halacha*.

There are two main branches within contemporary Judaism; Orthodox and what is known as Reform, or Progressive Judaism, (4) although various sub-categories exist in each branch. The expert witnesses called by both the defendant and the complainant in the case agreed that although Orthodox and non-Orthodox Jews shared a common cultural identity, there were 'significant' differences in doctrine between them. The essential difference between the two branches of Judaism is that the Orthodox believe the Torah (5), both written and oral, to have been divinely revealed. As it derives from an instrument of God, and has been interpreted since ancient times in an unbroken chain of Rabbinic tradition, the Orthodox believe that *halacha* must be strictly observed and cannot simply be changed to suit modern purposes.

Reform Judaism is a relatively recent phenomenon in the context of the long history of the Jewish people. It arose in Europe in the early 19Th century, partly as a result of the greater emancipation of Jews and the desire to live more at ease within the dominant Christian society (6). A central tenet of Reform Judaism is that the Torah is essentially an historical document that can be interpreted in an historical context. Rabbi Aaronsen, expert witness for the Goldberg's, gave evidence that all Jews, Orthodox and non-Orthodox alike, feel bound by *halacha* but that non-Orthodox Jews regard *halacha* as 'an ongoing process subject to change and interpretation over the course of generations'.

Many Reform Jews are also *halachically* Jewish as they fulfil the definition of having been born to a *halachically* Jewish mother, despite adhering to a reform philosophy. Reform Jews recognise the validity of Orthodox conversions but as a result of the differing views of *halacha*; the process does not work in reverse. The Orthodox do not recognise Reform conversions, as the Orthodox do not consider the Reform conversion process to be in accordance with *halacha*. Any person that converts to Judaism through the Reform process is not, therefore, considered to be *halachically* Jewish by Orthodox Jews.

Carmel School

Carmel School was established over forty years ago with the specific aim of providing Orthodox Jewish students with an '*halachic* education' ie. a Jewish education consistent with the principals of *halacha*. In the words of the school prospectus, the school has a 'commitment to traditional Judaism [which is] the cornerstone of the philosophy of the School' and the school operates 'within the framework of an Orthodox Jewish education'. In accordance with this philosophy, before 1992 only Orthodox Jewish students were able to attend Carmel School. Consistent with the Orthodox viewpoint, Orthodox students were those who had been born to a *halachically* Jewish mother or who had converted to Judaism in accordance with the requirements of *halacha*. Following a resolution by the school board in 1992, children of any religion were able to enrol at Carmel. That enrolment, however, had to be approved by the '*halachic* authority' at the school to ensure that the families who sought to have their child enrolled at Carmel supported the school ethos.

As Carmel School had been established for Orthodox Jewish students, the school board considered it appropriate to impose a number of restrictions on children wishing to attend the school, whom the school did not consider to be Jewish. Non-Jewish students were ineligible for fee assistance and scholarships and male non-Jewish students were ineligible to be head boy. One of the duties traditionally allocated to the role of head boy was participation in prayers and *halacha* requires that only *halachic* Jewish males lead prayers and wear T'fillin (phylacteries). In addition, Orthodox Jewish students were given precedence in class waiting lists. Following the incident with the Goldberg's, Carmel School reviewed the restriction relating to the choice of head boy. The amendment allowed a non-Jewish male to be head boy, however, if a non-Jewish student were to become head boy, the duties would be changed so that the head boy would not be required to lead prayers.

Testimony of the expert witnesses differed in relation to whether *halacha* supported the restrictions. Rabbi Aaronsen considered that there was a significant difference between *halacha* requiring a practice and looking to *halacha* to support a practice, although the Tribunal found that Rabbi Aaronsen conceded in cross-examination that *halacha* could potentially justify some of the restrictions. Rabbi Heilbrunn testified that the restrictions imposed on Gregory's enrolment were consistent with the requirements of *halacha*. The Tribunal considered that it was not necessary to resolve the conflict of evidence, simply to conclude that Carmel School was acting bona fide in its application of *halacha*.

The main argument of the complainant was that the restrictions imposed on him constituted discrimination on the grounds of religious conviction. As summarised by the Tribunal,

the complainant's grounds for complaint were firstly, that halacha did not justify the restrictions placed on him and secondly, the changes to the restrictions placed on non-Orthodox Jews in 1992 and subsequent to Gregory's enrolment application in 1996, indicated a lack of good faith on the part of Carmel School. As a result, the complainant contended that the defence contained in s73 (3) of the Act was unavailable to the School.

Discrimination on the Grounds of Religious Conviction

Carmel School imposed restrictions on Gregory's attendance at the school because, according to the Orthodox definition, he was not Jewish. Carmel School accepted that, by imposing restrictions on his attendance, they had discriminated against Gregory on the grounds of his religious conviction. However, they sought to rely upon the defence contained in s73 (3) of the Act, i.e. that an educational institution may discriminate in favour of its own adherents.

The Tribunal found that Gregory had been discriminated against as a result of his religious conviction but found that Carmel School had, on the weight of evidence, acted in good faith in favour of those it regarded as Orthodox Jews. The restrictions imposed were applied equally to all those the School regarded as non-Jews. The fact that some of the restrictions imposed were relaxed in 1992 and 1996 did not compromise the School's position of acting in good faith in favour of Orthodox Jewish students. Firstly, the Tribunal found that the amendment to the school's policy in 1992, which allowed non-Jewish students to enrol at the school, was intended to attract Orthodox children who may be in families considered to progressive in their level of observance. The Tribunal considered that the threshold question was whether the school had acted in good faith in favour of Orthodox Jews, when the policy favoured non-observant Orthodox families over devout non-Orthodox Jews.

Rabbi Heilbrunn testified to the possibility of Tshuvah, i.e. that a non-observant, yet *halachically* Jewish, student could change his or her level of observance to become an observant Orthodox Jew, whereas a non-*halachically* Jewish student, according to the Orthodox, could not be *halachically* Jewish without conversion. He considered that a person born *halachically* Jewish, even though non-observant, was never 'lost' to Judaism as there was always the possibility of 'return'. The Tribunal concluded that it was not inconsistent with Orthodox Judaism that non-observant *halachic* Jews should be favoured in this way.

In addition, the Tribunal found that the change removing the restriction on the head boy being *halachically* Jewish could be made without compromising the Orthodox tenets of the school, as the school had testified that they would change the duties of head boy should that situation arise.

In relation to the question of whether the restrictions were justified by *halacha* or not, the Tribunal, after considering the testimony of both expert witnesses, remained undecided. However, the Tribunal found that, as Carmel School was acting generally within its stated objective of upholding and promoting an education in accordance with the tenets of Orthodox Judaism, the defence contained in s73 (3) of the Act was available to the school.

Discrimination on the Grounds of Family Status

The Goldberg's also contended that Carmel School had discriminated against their son by imposing restrictions on him by virtue of his relationship to his non-Orthodox Jewish mother.

The Tribunal found that Gregory had not satisfied the onus on the balance of probabilities that the discriminatory conduct was due to his relationship to a non-*halachically* Jewish mother. Referring to the cases of *University of Ballarat v Bridges* (1995)(7) and *Ferguson v Central Sydney Area Health Service* (1990)(8), the Tribunal considered that there must be more than a sequential link and that the conduct complained of must be the 'true justification, reason or basis for the relevant decision'. Even though Gregory's relationship to his mother was an important sequential link in events complained of, as his Jewish status was determined by the Jewish status of his mother, the Tribunal found that this was not the operative cause of the discriminatory conduct. The Tribunal considered that the restrictions were placed on Gregory's attendance because, according to *halacha*, he was not Jewish. In addition, as it was possible for Gregory to convert to the Orthodox faith and, thereafter, be regarded as *halachically* Jewish, the Tribunal found that the restrictions placed on him could not be said to be as a result of his relationship to his mother. The Tribunal concluded that, in any event, the defence contained in s73 (3) was available to the school on this ground.

Discrimination on the Grounds of Race

S 44 of the Equal Opportunity Act makes it unlawful for an educational institution to discriminate on the grounds of race. The 'good faith' defence contained in s73 is not available for discrimination on the ground of race.

The Tribunal found that, as the weight of evidence suggested that Gregory was discriminated against because he could be categorised as a non-Orthodox Jew, the Tribunal would have to find non-Orthodox Jews constituted a separate race from Orthodox Jews. The Tribunal considered that the evidence was insufficient to support such a determination. The Tribunal did say, obiter dicta, however, that the evidence seemed to support that adherents of Judaism, whether Orthodox or not, could constitute a race, however, did not see the need to determine that question.

Voluntary Association

The Carmel School association was made up of parents of children attending the school and the Tribunal found that, as Carmel School was a non-profit organisation set up for educational purposes, it is a voluntary association. S71 of the Act applied, thereby, making it lawful for Carmel School to discriminate in connection with the provision of benefits, facilities or services to members of the body. The Tribunal accepted the submissions of counsel for the School and found that s71 should be interpreted on the grounds that it is directed to the beneficiaries of the service. The Tribunal relied upon the unreported decision of *Thompson v Evans* in which the parents of a sick child were also deemed to be beneficiaries of the service provided by a doctor. Although, technically speaking, a child attending Carmel is not a member of the association, the parents of the child are and the Tribunal considered parents to be beneficiaries of educational services because of their inherent interest in the child's welfare. Accordingly, the Tribunal found that, in any event, the provisions of s71 were enough to defeat the complainant's case.

One of the most significant aspects of the case is the finding by the Tribunal that the Act does not require an educational institution to justify its actions by reference to a particular religion or creed. Indeed, what is thought to be important in any given religion is a matter for those concerned with the traditions of that particular faith, rather than those external to it. 'Good faith' is interpreted to mean acting in a way that is generally in accordance with the religion and those actions do not have to be justified to, or even understood by, outsiders.

The *Goldberg v G Korsunski Carmel School* case illustrates the tensions inherent in the establishment of schools for religious objectives. Ultimately, the law allows a religious group to apply their own religious philosophy in establishing a school and Carmel School was acting bona fide in deciding who did and who did not qualify for unrestricted attendance at the school. Given an increasing focus on private education, with a sizeable proportion of institutions founded on religious tenets, the case has obvious ramifications for the wider educational community.

Endnotes

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2. *Halacha* comes from the Hebrew word 'to walk, with reference to Exodus 18 20; 'and thou shall show them the way wherein they shall walk', but is translated as 'law'. D. Goldberg & J. Rayner, *The Jewish People; Their History & Religion*, 1989, Penguin Books, London, p211
3. The use of the term 'non-Jewish' in this case note, in relation to Carmel School students, refers to their status from the Orthodox viewpoint
4. The use of the term 'Orthodox' in this article does not refer to the level of observance, rather it is used to denote 'birth status'. For ease of reference Reform or Progressive Jews will be referred to as 'non-Orthodox' or 'Reform'.
5. The Torah, or 'Five Books of Moses' is what Christians would know as parts of the Old Testament.
6. For a discussion of the modern movements of Judaism see Chapter 21 in 'Judaism' by Isidore Epstein, 1985, Penguin Books, London
7. 2 VR 418
8. EOC 92-272