

	Reference No. HRRT 048/2021
UNDER	THE HUMAN RIGHTS ACT 1993
BETWEEN	TAIMING ZHANG
	PLAINTIFF
AND	VICTORIA UNIVERSITY OF WELLINGTON
	DEFENDANT

AT WELLINGTON

BEFORE:

Ms MG Coleman, Deputy Chairperson

Dr PJ Davies, Member

Ms WV Gilchrist, Member

REPRESENTATION:

Mr T Zhang in person

Ms LS Castle and Ms M Smol for defendant

DATE OF HEARING: 26-27 April 2023

DATE OF LAST SUBMISSIONS: 15 May 2023

DATE OF DECISION: 14 November 2023

DECISION OF TRIBUNAL¹

OVERVIEW OF THE CLAIM

[1] Taiming Zhang was a student at Victoria University of Wellington (University) in 2020 and in 2021.

¹ [This decision is to be cited as *Zhang v Victoria University of Wellington* [2023] NZHRRT 36.]

[2] In 2020, Mr Zhang resided at Capital Hall, one of the University's catered halls of residence. He wished to reside there again in 2021 but this option was not open to him due to his age. Under a new policy which was introduced in August 2020 for the 2021 academic year, all catered halls were restricted to those under the age of 20 (other than the Helen Lowry Hall in Karori, some 4.5 kilometres from the University's Kelburn campus).

[3] The context and rationale for the introduction of the policy was explained to the Tribunal by Rose Cottrill, who was the Associate Director of Student Living at Victoria University.

[4] Ms Cottrill said that at the time that the policy was introduced the provision of residential accommodation needed to comply with the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (Pastoral Code). The Pastoral Code was introduced following the tragic death of a young first year student who had died in his room in a hall of residence at the University of Canterbury but whose body was not discovered for two months after his death. Following his death, the Government took steps to ensure that the pastoral care of students in halls of residence was managed in such a way that this would not happen again.

[5] Ms Cottrill said that the target market for accommodation in catered halls is students in their first year at university. She said that living away from home for the first time can be very challenging for students and some required significant support. Ms Cottrill described the needs of these vulnerable students as very different to those of more mature students and the policy enabled the University to better meet those needs. The University was also concerned about the incidence of coercive relationships between mature students and those under the age of 18. Ms Cottrill said that the policy was introduced to reflect these safety concerns and to ensure that students were appropriately looked after, consistently with the increased obligations under the Pastoral Code.

[6] As Mr Zhang was 22 years old at the start of the 2021 academic year, he was not eligible to live in Capital Hall or in any of the other catered halls in the central Wellington area.

[7] Mr Zhang claimed that the new age restriction policy was directly discriminatory on the grounds of age in breach of s 53 of the Human Rights Act 1993 (HRA).

[8] Mr Zhang has arthritis in his big toe, which makes walking painful. For this reason, he also claimed that the policy indirectly discriminated against him on the grounds of disability in breach of s 53(1)(d) and s 65 of the HRA. This was because most of the (age restricted) catered halls were located in areas of central Wellington where there was reasonably flat access to public transport to the University. In contrast, access to the University from student accommodation open to older students was more likely to be on hills and thus more difficult for someone with his disability.

[9] The University denied its policy was discriminatory. It said the effect of the exception in s 55 of the HRA means that neither the prohibitions on direct nor indirect discrimination under either s 53 or s 65 of the HRA applied to student hostel accommodation. If wrong on that point, the University said it had reasonably accommodated Mr Zhang's disability, and that any indirect effect of its policy was justified given the vulnerability of students who lived in those catered halls who were largely in their first year away from home.

[10] Mr Zhang argued that the policy did not fall within the exception in s 55 because accommodation in the catered halls (subject to the policy) is not provided *only* to those under the age of 20, as is required by s 55. He said this is because in each of the catered halls there is accommodation for Residential Advisers (RAs) to whom the age policy does not apply.

THE LAW

[11] The claim was brought under Part 2 of the HRA.

[12] Section 53(1), which is in Part 2 of the HRA, sets out the prohibition on discrimination in housing and accommodation in the following terms:

53 Land, housing and other accommodation

- (1) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal,—
- (a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to any other person; or
 - (b) to dispose of such an estate or interest or such accommodation to any person on less favourable terms and conditions than are or would be offered to other persons; or
 - (c) to treat any person who is seeking to acquire or has acquired such an estate or interest or such accommodation differently from other persons in the same circumstances; or
 - (d) to deny any person, directly or indirectly, the right to occupy any land or any residential or business accommodation; or
 - (e) to terminate any estate or interest in land or the right of any person to occupy any land or residential or business accommodation,—

by reason of any of the prohibited grounds of discrimination.

[13] The prohibited grounds of discrimination are those set out in s 21(1) of the HRA and include both age and disability.

[14] An exception to s 53 is provided for in s 55:

55 Exception in relation to hostels, institutions, etc

Nothing in section 53 shall apply to accommodation in any hostel or in any establishment (such as a hospital, club, school, university, religious institution, or retirement village), or in any part of a hostel or any such establishment, where accommodation is provided only for persons of the same sex, marital status, or religious or ethical belief, or for persons with a particular disability, or for persons in a particular age group.

[15] While s 53(1)(d) refers to the indirect denial of the right to occupy residential accommodation, there is also a general prohibition against indirect discrimination in s 65 of the HRA:

65 Indirect discrimination

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or

practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

ISSUES

[16] The Tribunal must first determine:

[16.1] Whether the s 55 exception applies to the catered halls covered by the policy, including whether the exception cannot apply because RAs aged 20 years and over also reside in the halls; and

[16.2] If the s 55 exception does apply, what is its effect on the indirect discrimination claim made under s 65. Mr Zhang does not dispute that if s 55 applies his s 53 claims must fail.

[17] If the exception in s 55 does not apply, then the Tribunal will need to determine:

[17.1] Whether the policy directly discriminates on the grounds of age under s 53(1)(c) or (d) of the HRA; and

[17.2] Whether the policy indirectly discriminates on the grounds of disability under either s 53(1)(d) or s 65.

DOES THE S 55 EXCEPTION APPLY IN THIS CASE?

[18] The exception in s 55 (which is set out in full above at [14]) expressly applies to:

[A]ccommodation in any hostel or in any establishment (such as a ... university, ...), or in any part of a hostel or any such establishment, where accommodation is provided only for persons of ... a particular disability, or for persons in a particular age group.

[19] The University submitted that the effect of this exception means that neither the prohibitions on direct or indirect discrimination under either s 53 or s 65 of the HRA applied to the catered halls (hostels) covered by the policy.

[20] Mr Zhang submitted that the University is not entitled to rely on that exception as the presence of RAs in the catered halls means the accommodation in those halls is not provided *only* to those under the age of 20, which is required by s 55.

[21] RAs are senior students who are employed and trained by the university to support younger (usually first year) students that live in the catered halls. Consistent with the requirements of the Pastoral Code for there to be live-in staff, RAs are required to reside in the catered halls as a term of their Employment Agreement. The Employment Agreement for RAs also requires them to be police-vetted prior to being employed. As employees, Ms Cottrill said the RAs must also comply with policies that apply to all University staff, which include a code of ethics and the Close and Intimate Relationships Policy.

[22] In addition to providing pastoral care to individual students, RAs are also required to develop and maintain the hall's sense of community and to provide leadership through the provision of social and academic learning opportunities. Ms Cottrill's evidence was that the age policy does not apply to RAs and, given they are required to be senior students, most (if not all) will be 20 years of age or older.

[23] Ms Cottrill further said that RAs reside in studio units with a separate lounge and ensuite facilities, and that those rooms are different to those offered to other students in age-restricted catered halls. The Employment Agreement specifies the fortnightly rate that RAs are required to pay for their rooms.

[24] Mr Zhang submitted that Parliament's intention when enacting s 55 was to permit segregation in hostels or parts of hostels on the grounds set out in that section. He further submitted that the phrase "any part of a hostel" required physical segregation between the different parts. He said that the fact that RAs occupied a room with a different layout was not sufficient for each of these rooms to constitute a different "part" of a hostel and because the RAs occupied rooms which are located next to rooms where the younger students slept, catered halls were not in fact segregated. For these reasons, Mr Zhang argued the exception in s 55 does not apply.

[25] We agree that the purpose of s 55 is to permit segregation in hostel living arrangements on the grounds set out in that section. It does not follow, however, that because the rooms occupied by RAs are situated next to those of the younger students that the exception necessarily does not apply.

[26] On one view, it could be argued that the catered hall is only providing accommodation for a particular age group despite there being some live-in staff (the RAs) being located within it. RAs do not apply to occupy a particular catered hall but rather are required to reside there as a term of their employment. For this reason, it could be said that the presence of the RAs does not affect the application of s 55. It is not necessary, however, to decide this question as the exception will apply provided "part" of the catered hall is reserved for those under the age of 20 only.

[27] The word "part" is not defined in the HRA. It is, however, defined in the dictionary as "a piece or segment of something which combined with others makes up the whole (whether actually separate from the rest or not)",² and there is no reason for "part" not to be given its ordinary meaning. It is consistent with that definition for rooms occupied by RAs to form one part of the catered hall and rooms occupied by students under the age of 20 to form another. Even if, as Mr Zhang submitted, physical segregation is required, it could be argued that requirement is met in this case by the walls of each bedroom.

[28] Ultimately, what amounts to "any part" will be a matter of fact in each case, taking into account the purpose of s 55. Whether physical segregation is required in any particular case, may be a relevant consideration.

[29] In the factual context of this case, we are satisfied that the rooms occupied by students subject to the age-policy form "part" of each catered hall, meaning the exception in s 55 applies. As we have already noted, such a finding is consistent with the meaning of "part".

[30] Further, there are strong policy reasons why the exception should apply in this case. First, it is consistent with general expectations around managerial oversight of hostels and, in this case, the duty of care obligations arising under the Pastoral Code, for there to be live-in staff. In this case it cannot have been intended that the only people who are able to provide that oversight or care are also under the age of 20. The presence of the RAs supports rather than undermines the reason why age-related restrictions were introduced into the University's catered halls and is therefore consistent with the purpose

² *Oxford English Dictionary* (online ed, Oxford University Press) at definition of "part", noun, 1.3.a.

of s 55 exception. Secondly, RAs make up a very small percentage of the total number of students residing in the catered halls. In the case of Capital Hall, for example, there are only ten RAs employed to provide support to 390 students, meaning RAs make up only 2.5 percent of the total number of students (including RAs) who reside at Capital Hall. Their presence does not alter the overwhelming segregated nature of these catered halls.

[31] We therefore find in this case that the rooms in catered halls which are occupied by students that are not RAs, constitute “part” of a hostel for the purposes of s 55 of the HRA. The exception in s 55 therefore applies and Mr Zhang’s direct discrimination claim under s 53 fails.

WHAT IS THE EFFECT OF S 55 APPLYING TO THE INDIRECT DISCRIMINATION CLAIM UNDER S 65?

[32] Mr Zhang accepted that if s 55 applied he would not be able to claim the policy was indirectly discriminatory contrary to s 53(1)(d). However, he maintained that a claim under s 65 of the HRA, that the policy indirectly discriminates on the ground of disability, is still open.

[33] For ease of reference that section is set out again below.

65 Indirect discrimination

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

[34] Mr Zhang’s submission is that if s 55 applies this means the age requirement or condition would not be in contravention of any provision of Part 2 of the Act, referring to the preamble of the wording of s 65. He submitted that this means that the Tribunal can still consider whether that age restriction has the effect of treating a person or group of persons differently on the grounds of age.

[35] Mr Zhang’s submissions, however, fail to take the whole wording of s 65 into account.

[36] That wording makes it clear that it is not sufficient for a claim of indirect discrimination for a policy to have the effect of treating people differently on a prohibited ground. Section 65 also stipulates that the effect must arise in “a situation where such treatment would be unlawful under any provision of this Part”. That requirement reflects the nature of Part 2 the HRA more broadly. Under Part 2, the prohibition on discrimination is not universal. It applies only in relation to certain conduct that arises in particular situations; such as in employment,³ in relation to access to places, vehicles or facilities⁴ or the provision of goods and services,⁵ in educational establishments,⁶ and, as in this case, in the provision of land, housing and other accommodation.⁷ Unless the conduct

³ Sections 22–35.

⁴ Sections 42–43.

⁵ Sections 44–52.

⁶ Sections 57–60.

⁷ Sections 53–56.

complained of falls within one of the spheres of activity where discrimination is prohibited under Part 2, there is nothing unlawful about it.

[37] The effect of s 55 in this case is to remove the University's provision of accommodation in age-restricted catered halls from the operation of s 53 of the HRA. For this reason, even if (as Mr Zhang contends) the policy has the effect of treating him differently on grounds of disability because his access to the University is more physically difficult, that effect does not arise in a "situation where such treatment would be unlawful under any provision of this Part", to use the words in s 65. Put simply, if direct discrimination on grounds of age in relation to the University's hostel accommodation policy is outside of the scope of the prohibitions that apply to land, housing and other accommodation as set out in ss 53–56 of the HRA, then an indirect discrimination claim relating to the University's hostel accommodation policy also falls outside of the jurisdiction conferred by s 65, even if the claim is based on a different prohibited ground, in this case disability.

[38] To accept Mr Zhang's argument would be to render nugatory the scheme of Part 2 of the HRA which limits the prohibition on discrimination to that which arises in certain spheres of activity. Interpreting s 65 in the way contended for by Mr Zhang would permit claims of indirect discrimination in all situations, not just those which are set out in Part 2. That interpretation cannot have been intended.

[39] The claim for indirect discrimination under s 65 cannot succeed.

CONCLUSION

[40] In conclusion, the effect of s 55 in this case means that the University's catered hall age restriction policy, which was introduced in 2020 for the 2021 academic year, is neither directly discriminatory on grounds of age, nor indirectly discriminatory on grounds of disability. Accordingly, all of Mr Zhang's claims, fail.

COSTS

[41] The issue of costs was not raised at the hearing. However, the Tribunal does not consider this to be an appropriate case for an award of costs. The claim was not trivial but rather represented a significant change in circumstances for Mr Zhang which adversely affected him. It also raised an important issue of public interest that required answering. There will be no order of costs.

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Ms MG Coleman
Deputy Chairperson

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Dr PJ Davies
Member

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Ms WV Gilchrist
Member