

Overview

On January 12, 2014, the Tel-Aviv District Court accepted an appeal by the **National Association of GLBT in Israel** against the judgment of the Tel-Aviv Magistrates Court, which had dismissed their petition seeking compensatory damages from the Makor Rishon newspaper, owing to their refusal to publish an LGBT outreach advertisement in their newspaper. The Makor Rishon newspaper has a predominantly national-religious readership.

The District Court ruled that the refusal to publish the advertisement constitutes a violation of the Prohibition of Discrimination in Products and Services Law, thus entitling the Association to compensation without requiring proof of damages.

The Makor Rishon newspaper was ordered to pay compensation to the sum of NIS 50,000 in addition to NIS 10,000 of the Association's legal costs.

The appeal, as well as the original petition, was filed by the **Human Rights Program at Tel Aviv University**

Justice Ruth Lebhav-Sharon noted in her ruling that: "I believe that, generally, newspaper advertisements fall clearly under the category of "public services". Newspaper advertisements, which have been around since well before the internet period, are the oldest means of advertising. Newspapers as we know make a living from publishing advertisements to the wider public. Newspapers play an integral role in facilitating public discourse, and as such are not a "regular" private enterprise."

The newspaper claimed in court that even if it was accepted that the anti-discrimination law did apply to this case, then the newspaper's conduct should fall within one of the law's exception that states that conduct is not to be considered discriminatory "when it is necessary by virtue of the character or nature of the product, public service or public place."

Trial Court Verdict

The trial court originally ruled that this case did indeed fall within the above exception. The ruling indicated that "[t]his general restriction set forth in... [t]he Act permits discrimination in the provision of services on the basis of religious beliefs, as in this case, where the respondent believes that the plaintiff possesses an ideological opposition to the religious lifestyle of the respondent, specifically their views on sexual orientation." The court noted that, while a newspaper possesses the freedom to choose what to publish and what not to publish – it is not an unlimited freedom, yet preferred in this case the property rights of the newspaper.

The court held that publication of the appellant's advertisement may hurt the sensibilities of the predominantly national-religious readership, which operates under Jewish law that prohibits homosexuality, and as a result, disproportionately harm the property rights of the defendant, especially when there are other avenues available to the plaintiff to achieve its purpose.

The court accepted the newspaper's argument that publishing the advertisement would only increase the sense of confusion regarding sexual identity among its national-

religious audience, without providing an outlet to seek help, as the appellant does not have a presence within the religious world. Consequently, the refusal is based on maintaining a responsibility towards its customers and not out of a prohibited discrimination.

The court additionally accepted the argument of the paper that publishing the advertisement would only increase the sense of confusion among those confused about their sexual identity, and that this confusion could not be alleviated by the advert as the association does not have a presence in the religious world. As such, the court found that the key motive of the defendant was maintaining its responsibility towards its customers, and was not a prohibited discriminatory motive.

Appeal Court Verdict

The Tel Aviv District Court however expressed confusion as to how the lower court came to the factual conclusion that the refusal was due to protecting the newspaper's readers when no evidence was submitted on this matter. The lower court ruled that the refusal was not a prohibited discrimination based on the fact that the newspaper did indeed publish articles that deal with sexual identity. In the eyes of the District Court, this argument served to prove the contrary. The fact that the respondent had published articles dealing with sexual identity that related to the LGBT community, means that the newspaper can not suitably explain its resistance to publishing the advertisement, as it is not a message that can harm its readership, offering as it does a form of outreach assistance.

The public nature of the advertisement under discussion cannot be ignored. The fact that the appellant could advertise in a daily newspaper for the general public, as the lower court argued, was deemed to be insufficient.

The lower court was found to have erroneously linked the advertisement with homosexual intercourse without any basis. Rather, the advertisement was found to be modest, the sole purpose of which was to raise awareness and provide information to those seeking assistance. The advertisement does not encourage homosexual activity, but merely refers to the existence of a range of sexual orientations within the religious community. Seeing as the newspaper publishes articles on this topic, the court did not find any relevant distinction preventing the publishing of an advertisement.

"The content of this advertisement is insufficient to harm public sensibilities. Certainly not to the extent that it causes severe injury. Moreover, if any harm is due to the very recognition of the existence of different sexual orientations, or due to advice given by forces do not operate in accordance with religious law, then there is no justification for the refusal to publish the advertisement."