

16/84

## INDUSTRIAL RELATIONS COMMISSION OF VICTORIA IN COURT SESSION

**BARBIERI v TUCKER**

KD Marshall, President

26 January, 15 April 1984

**INDUSTRIAL LAW – LABOUR AND INDUSTRY – FAILURE TO CLOSE A SHOP ON A SUNDAY - BOMBONIERA SELLING SUGARED ALMONDS WITH OTHER ARTICLES – WHETHER CONFECTIONERY SHOP: LABOUR AND INDUSTRY ACT 1958, S80(1), FIFTH SCHEDULE.**

The Fifth Schedule to the *Labour and Industry Act* 1958 lists a number of classes or kinds of shops which need not be closed on Sundays; one of those classes being "confectionery and pastry shops". B. conducts a business named La Casa Della Bomboniera. This shop carries a large range of goods of between 300-400 different items including statuettes, goblets, figurines, articles made of silver, crystal, pewter, venetian glass and other goods. B. also sells sugared almonds in a tulle bag which is usually attached to a figurine or some other article. On charges of illegal weekend trading, B. argued that because of the sale of the sugared almonds with other articles, his shop was a confectionery shop and therefore exempted from the provisions of the Act. This argument was rejected by the Magistrate and convictions were imposed. On appeal—

**HELD: Appeal disallowed. Convictions confirmed.**

**B's shop cannot be characterized as a shop which comes within the class or kind of shop comprehended by the words "confectionery and pastry shops".**

**KD MARSHALL P:** *[After setting out the relevant provisions of s80 of the Labour and Industry Act 1958, and the facts, the President continued]: ... [2] A bomboniera is part of Italian tradition. (It may also be part of the culture of other Mediterranean countries). At a wedding (but also on other important family occasions such as the christening of an infant, a baptism or confirmation, a first communion, an engagement, gold and silver wedding anniversaries, a 21st birthday, or a graduation) it is a custom that guests will be invited to attend an appropriate celebration function. The host and/or hostess makes a gift to the guests of a bomboniera, [3] as a token of enduring love or friendship, good health and long life. The bomboniera is placed on the table in full view of everyone present, together with the wine and food, and is part of the banquet.*

For present purposes, the best description of bomboniera can be taken from the appellant's evidence:

"A bomboniera is an Italian name that is derived from the French, "bon bon", and that means "confectionery". That is in the *Oxford Dictionary*. A bomboniera is a tulle bag or a veil, or it could be a net, round, square, or a different shape of about 30 centimetres (?) in diameter, and the original bomboniera was only the sugared coated almond with the tulle, the net and the ribbon. The tradition is to make a bomboniera today you can use (almost) anything. You can use a fork, a knife, a little spoon, a chandelier, a glass, a statuette or ceramic, even for the people who can afford silverware, and you attach the bags, and you give them to the guests at weddings, baptisms, christenings."

A bomboniera may consist of an expensive or less costly article (this varies with the financial resources of the host) and sometimes may be no more than the tulle bag with almonds. But whatever it is, it is never complete without the bag of almonds. The appellant gave evidence that he does not sell articles simply as gifts; he sells only bombonieri (the plural of bomboniera). He does sell tulle bags containing almonds. Not any and every article can be used – e.g. working tools are inappropriate. Articles which are used should be of such a kind that the complete bomboniera is artistic and well presented. The colour of the sugared almonds (usually, there are five in the small tulle bag) varies according to the nature of the occasion – e.g. white for a wedding, pink or blue for the christening of an infant girl or boy, green for an engagement, gold for a golden wedding, red for a 21st birthday, etc.

[4] It was said in evidence that the selection and buying of bombonieri is a custom in which a whole family or group may participate, and therefore it is carried out when they can

all be present (e.g. a Sunday) and have time to make that kind of preparation for a forthcoming banquet. I have come to understand that a bomboniera consists firstly of material objects – i.e. an article (a figurine etc.) to which is attached a tulle bag containing five sugared almonds which are coloured to suit the particular family occasion. It is a token given by a host and/or hostess to guests and an essential element of that token is the intangible expression of the goodwill of the host to the guest. It is that composite token which constitutes a bomboniera.

Few people would want to deny that it is truly a charming custom in these modern times. But the Commission is concerned here not only with delightful tradition. It is required to decide whether or not the appellant contravened provisions of the *Labour and Industry Act* 1958 in the terms in which it was expressed when he opened his shop on those two Sundays in 1983.

Mr Triado made an eloquent submission for the appellant, as follows:

"Our principal submission is that on the evidence, the articles sold by the appellant in this case, a bomboniera, is an integral thing. It is indivisible. It is impossible to divide confectionery from the ornament, package, or whatever it is in which it is presented and the essential thing of it is the confectionery itself – and as we know, they are used according to custom and even on their own are the symbol of good wishes, whatever they may be, to the guests who are partaking of them. They are equivalent almost to a toast of wine which has got a symbolic meaning. These are given to the guests to enhance and embellish the occasion and that has a spiritual or even sentimental meaning to stress what is taking place. [5] That is why such a shop happens to be open in Australia, for fulfilling this need to embellish the weddings which are obviously taking place amongst these ethnic groups. It has developed this way and that is the *raison d'être* for it. I stress in that the essence or core of it is food, is this confectionery, is the confetti itself, the bonbon and I say the very words "confetti and bonbon" refer to sweets and our English word "confectionery" is derived from the same root as confetti. The submission which I have not put formally but clearly which the Commission will know we are making is that this type of business comes within the schedule of the *Labour and Industry Act* in which confectionery is listed as a type of shop which is exempt from having to close on Sunday.

Mr Barbieri is prosecuted under section 80 for not having a shop closed on Sunday and is exposed to the penalties for not doing so, but in the section it refers to the exceptions to that requirement of the law and those exceptions are set out in the Fifth Schedule to the Act, the second class of which in the schedule of shops mentioned is "confectionery and pastry shops". Formally I put that our submission is that Mr Barbieri's business is rightly classed as a confectionery shop and this is reflected in the cases... In the hearing in the Magistrates' Court the prosecution did rely on the two-shop doctrine and in general, before referring to any of the law on that, I reiterate that we really do not have to face that question at all because our primary submission is that we are not selling two types of article but one integrated article and that article should be classified as confectionery. Evidence showed that Mr Barbieri was constrained to register as a food premise... I refer to a report made by the Australian Ethnic Affairs Council to the Minister who was the then Honorable Mr McKellar on the question of ethnic affairs in Australia... One point that is stressed in this report is the point of cultural identity, that in our view institutions must open their eyes to recognise the cultural identity as being defined in this sense of belonging and attachment to a particular way of living associated with the historical experiences of a particular group of people. [6] This particular bombonieri custom is precisely one of those customs and we see in Australia, and the Government sees, that we open our minds to look at it and we present to the Commission the task of interpreting this new type of shop in that way.'

Whilst I have quoted the foregoing extracts from Mr Triado's submission, his full argument has been considered. It is true that the appellant sells sugared almonds, which are items of confectionery. I am prepared to accept that he usually sells them in a tulle bag which is attached to a figurine or some other article. I am also willing to acknowledge that when he sells them in a tulle bag alone, he is not selling them as confectionery to be consumed as such but as a bomboniera in its simplest form or as a part of a bomboniera which will be made up by the purchaser.

However, given the evidence about the nature of the business which is conducted from the premises known as La Casa Della Bomboniera, I am unable to accept that it can properly be characterized as a shop which comes within the class or kind of shop comprehended by the words "Confectionery and pastry shops" appearing in the Fifth Schedule to the *Labour and Industry Act*. Even if it had been possible for the shop at 258 Lygon Street, Carlton, to be classified as a confectionery shop by reason of the sale of sugared almonds, because goods of a different kind or class are sold there the appellant would need to comply with the requirements of section 91(2) of the *Labour and Industry Act* before he could lawfully sell sugared almonds on a Sunday. There is no evidence that he was prepared to so restrict his trade. I do not accept Mr Triado's

argument that Mr Dent's submissions on this point were based upon a wrongful assumption that the material items which make up a bomboniera are to be regarded as severable goods. [7] As Mr Dent, who appeared for the respondent Mr Tucker, said: "This law does not attach itself to cultural groups, it simply regulates trading hours". He, as do I, conceded that "there should be tolerance of customs ... but customs cannot be used to allow a breach of the law". The result of this appeal is that orders of the Carlton Magistrates' Court are confirmed.

**APPEARANCES:** Mr Triado for Barbieri. Mr G Dent for Tucker.

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