

Equality & Justice

for people with disabilities



March 2021

THE ADVOCATE



Villamanta Disability Rights Legal Service Inc.

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ACCESS – if you need this in an alternative format, please let us know

Welcome to the first Advocate for 2021. It goes without saying that we are all hoping for a better year.

The consequences of 2020 continue to be felt.

DDLS is receiving many enquiries about the requirement to wear masks. Questions are being asked about the protection of people with disabilities from Covid last year and where government missed the mark. Many people with disabilities, their families and carers are currently asking questions about special arrangements for vaccinations for those who may need anaesthetic or other special supports due to anxiety.

As with other tragedies, such as the bushfires, the most in-depth and analytical conversations seem to happen after it's all over, examining why the support to people with disabilities failed.

Surely we can do better.

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DDLS – back to work

After quite a period of time providing services remotely, staff at the Disability Discrimination Legal Service have returned to our office in Flinders Lane.

Our service hours remain unchanged, Monday-Friday, 9 AM-5 PM.

Phillips v Pelikan Societé (Human Rights) [2021] VCAT 130

Parties

- Michael Phillips (the Applicant) has a psychosocial disability and has two assistance dogs that are trained by him, in basic obedience.
- Pelikan Societé (the Respondent) is a café and restaurant in Hastings (the café) operated by Thomas Greener and Toulá Bradshaw.

Issue: Whether the Respondent has contravened Part 4 of the *Equal Opportunity Act 2010* (EO Act) by unlawfully discriminating against the Applicant. The particulars of the alleged discrimination include a refusal to admit two assistance dogs at the Respondent's café and restaurant.

Facts

- The Applicant, together with his dogs, had been an occasional visitor to the café over a three-year period.
- Whilst attending a private function at the café, the Applicant, with his dogs, stood at the bar area which was also the corridor leading to the toilets. According to the Applicant, Ms Bradshaw stated in a raised voice that he and his dogs were blocking the passage of staff. He described this as "poor customer service".
- Sometime after 29 November 2019, the Applicant was served with an Interim Intervention Order, applied for by a local Police officer on behalf of Ms Bradshaw. The Order was reduced to restrictions on him while maintaining that he must not intimidate or harass Ms Bradshaw.
- Alternatively, Ms Bradshaw claimed that her business was dog friendly and accommodating of persons with disability or special needs. She said that she and Mr Greener were concerned at the offensive smell of the dogs which they believed was not acceptable in serving café food.
- The Respondents were also concerned that the sprawling of the dogs over the floor was an occupational health and safety issue. They expressed this to the Applicant who they claimed was unresponsive to the numerous requests to move the dogs to a safer space.
- On the other hand, the Applicant held the view that no one had tripped or fallen as a result of the dogs. However, he did accept that the dogs were never under the table and sometimes made noises that could sound like a snarl.
- According to the Respondent, customers to the café, including the local Police Officer complained about the presence of the dogs. An unnamed Police Officer told Mr Greener that the dogs were not recognised assistance animals and it would be within the Respondent's rights to exclude the dogs from the café.

- On 29 November 2019, the Applicant and his dogs arrived at the café to meet with a friend for coffee. Upon the advice of the Police, Mr Greener told the applicant that he and his dogs could not enter the café.
- The Applicant allegedly stated that he had no obligation to prove that his dogs were assistance animals and became insistent to enter the café. Mr Greener claimed to have offered the applicant seating in the undercover alfresco area. However, the Applicant and his friend left the café and described feeling insulted by the Respondent.

Findings

- In order to succeed with his claim, the Applicant needs to establish –
 - i) He has a protected attribute within the meaning of the EO Act;
 - ii) the respondents treated him unfavourably because of his attribute;
 - iii) in a protected area of public life; and
 - iv) in a prohibited way (not the subject of an exemption or exception).
- **ATTRIBUTE**
 - Even in the absence of evidence, the Applicant was accepted to have a mental illness which is a protected attribute within the meaning of the EO Act.
- **PUBLIC LIFE**
 - It was also accepted that a restaurant and café is an aspect of public life – providing goods and services.
- **TRAINING FOR ASSISTANCE ANIMALS**
 - The EO Act is silent on the question of who must provide training to the assistance animals and the certification of such training. It was accepted that it is not a requirement that assistance dogs be certified or be trained by a particular organisation to a particular standard. In this case, the dogs were trained by the Applicant himself, in basic obedience.
 - The EO Act requires that an assistance animal be trained to perform tasks or functions that assist a person with disability to alleviate the effects of the disability. Although the dogs provide comfort to the Applicant and he is deeply attached to them, they must be trained to alleviate the effects of his disability. Here, there was an absence of evidence put by the Applicant to show that the dogs were trained to perform tasks or functions to alleviate the effect of his disability. Hence, the dogs were not considered to be assistance animals within the meaning of the EO Act.
- **EXCEPTIONS**
 - The EO Act contains exceptions that protects behaviours that are necessary to protect the public or to balance competing rights. While the Respondent's did not specifically invoke any exemption, they provided sworn evidence of exercising their rights and their obligations for the continued safety and well-being of member of the staff and customers on the premises.
- **UNFAVOURABLE TREATMENT**
 - Denying entry to the Applicant and his dogs was not unfavourable treatment because the dogs were not considered to be assistance dogs. In the event that the dogs were assistance animals, excluding the Applicant and his dogs was reasonably necessary to protect the health and safety of staff and other patrons of the café. The Respondents had initially sought the cooperation of Applicant by requesting him to control and contain the dogs, which was refused by the Applicant.

Orders

The application was dismissed as there was no illegal discrimination by the Respondents.

Complainant 201947 v The Australian Capital Territory (As represented by ACT Education Directorate) (Discrimination) [2021] ACAT 5 (29 January 2021)

Parties

- The Complainant was subjected to a suppression order, as was the immediate family. The child the subject of the complaint, 'H' has epilepsy, fine motor delays and has a generalized anxiety disorder and post-traumatic stress disorder.
- The Australian Capital Territory (as represented by ACT Education Directorate) (the Respondent) represent H's primary school (the School).

Issue: Whether a primary school run by staff employed by the Respondent discriminated indirectly against a pupil, H, and his father (the Applicant) on the following grounds:

- Imposing a regime of restricted hours on H.
- Failing to provide a teacher's aide or learning support assistant (**LSA**) during Term 1.
- Failing to provide a safe learning environment.
- Failing to follow appropriate learning strategies for H.

Facts:

- H joined the school as a Year 4 pupil in the last two weeks of Term 3 in 2018. In Term 4 of 2018 he attended approximately 19 full days that term, frequently for reduced hours in order to help H's adjustment.
- Prior to this school, H had attended another school in NSW.
- Prior to the start of the school year in 2019, the Applicant met with H's new teacher (the Teacher) and H started attending school for one hour per day which was to be increased to two to three hours. In mid-February, the applicant started pressing that H attend school for longer period.
- In March 2019, H started to be schooled at home undertaking class activities set by his teacher, through online learning and regular communication with his teacher. The applicant advised that this was due to their concerns about H's safety at school and lack of school resources supporting him.
- H returned to the school on 26 June 2019. The school proposed that H's hours of attendance increase from two hours to a full day by 25 July 2019.
- However, the Complainant's parents raised H being given an iPad to use in classes for several hours instead of undertaking class activities, and they exchanged several emails with the school in this regard.
- H's last day of the school was 1 July 2019.
- The Complainant's parents filed a complaint on 8 April 2020 for direct and indirect discrimination against H. However, after the final submissions to the Tribunal, the Complainants alleged that the forms of discrimination against them and H was all related to indirect discrimination.
- The Complainant claimed that the indirect discrimination was on four grounds:
 1. The school imposed a regime of restricted hours on H which varied between Term 4 of 2018 and Term 1 of 2019.
 2. Failing to provide a suitable LSA, requiring at the start of the 2019 which required H's parent to attend school with him.
 3. Failing to provide a safe learning environment, being the possibility of H accessing the school's roof when he was anxious, which could put his life in danger.
 4. Failing to provide appropriate learning strategies for H, rather allowing him to spend a large amount of time playing on an iPad in class.

Findings

- In order to succeed with his claim, the Complainant needed to establish –
 - I) The imposing of a regime of restricted hours on H.
 - II) A failure to provide a teacher's aide or learning support assistant (**LSA**) during term 1.
 - III) A failure to provide a safe learning environment.
 - IV) A failure to follow appropriate learning strategies for H.

ATTRIBUTE

There was no dispute that H had a disability which is a protected attribute under section 7(1)(e) of the Discrimination Act 1991 (the Act) as did his father under section 7(1)(m) of the Act.

Reduced school hours for H

The Tribunal found that H was not discriminated against due to restricted hours at school being proposed by the school for the first month of term 1 (2019). Also, H was not indirectly discriminated against in the reduced schools' hours proposed for H.

The Tribunal was given evidence by Deputy Principal that there was a discussion between the school and the applicant in relation to H's transition period from shorter to longer days in order for H to get accustomed to the school environment. The Tribunal state that the reason for the school's action was the duty of care held by the school to other pupils and staff. H exhibited behaviours of concern. For instance, he stabbed scissors into a whiteboard, was verbally abusive and aggressive to students and threw chairs at his teacher. Similar behaviours were allegedly displayed in his former school as well.

The school maintained constant communication with H's parents and created an exclusive Individual Learning Plan (ILP) which had as an aim to incorporate him in to the school as a full-time student; however, the Complainant was not in full agreement with that. Finally, the Tribunal considered that while the school's proposal of H's graduated hours could be seen as a condition, it was not unreasonable as the disadvantage was disproportionate to the result sought by the school.

Failure to provide a teacher's aide to support H in term 1 2019

The Tribunal did not consider that the failure to provide a dedicated LSA for H's class to be a disadvantage for H, and therefore, the school did not discriminate against him. The Tribunal did not consider the disadvantage to equate to discrimination, as it was not unreasonable. The Tribunal mentioned that the school could have provided a better approach to support H's need, however, the school provided and arranged options for H as there were two LSAs covering activities Both in the classroom and outside of the classroom.

Failure to provide a safe learning environment.

The Tribunal found that the responded acted promptly in removing the bolts of H's class room door. The Tribunal considered that the school responded to the Complainant's concerns about the bolts' potential impact on H in a reasonable timeframe which was fully removed on 4 April 2019. The Tribunal accepted the evidence that the bolts were installed many years before H joined the school and were not installed to lock him in the classroom. Therefore, the Tribunal does not consider that this period of time leads to any finding of discrimination against H.

Additionally, the school tried to provide a safe learning environment as much as they could by developing a Protective Action Plan. The Tribunal also acknowledges the fact that the respondent needed approvals under the ACT legislation in order to carry out the alterations. The Tribunal states that it does not consider the consultation, approval process and the time it took to equate to the imposition of condition as it was reasonably given that the school was required to comply with fire, heritage and other legislative requirements. Therefore, the school proved to try to address the immediate risks to H if he tried to access the fire escape or roof again

Failure to follow appropriate learning strategies for H.

The Tribunal was unconvinced that the school discriminated against H in failing to provide appropriate learning strategies as claimed by the Complainant. The use of an iPad was suggested by a teacher who has experience in working with children with a disability. The use of it was for educative purposes and the idea was to engage H, hopefully leading to discussions with his peers. The Tribunal states that the school's conduct was not discriminatory to H.

Orders

The application was dismissed as there was no illegal discrimination by the Respondents.

Disability Royal Commission

The Third Progress Report of the Disability Royal Commission can be found here <https://disability.royalcommission.gov.au/publications/third-progress-report>

If you would like to share your story with the Disability Royal Commission, find out more here <https://disability.royalcommission.gov.au/share-your-story>

The Disability Royal Commission has been running for almost two years (of a three-year Royal Commission) without proper protections in place for survivors and witnesses to tell their stories.

As it stands, people who provide information in a private session can have their privacy protected, but anyone providing written submissions to the Disability Royal Commission is only guaranteed confidentiality until the Royal Commission concludes in April next year. For many survivors and witnesses, this a barrier to telling their story.

The Government [made a commitment](#) to introduce legislation to make it safe to speak to the Disability Royal Commission in the March sitting of Parliament, but the sitting is now next week and they have not yet produced a draft of the legislation needed.

We need to hold them to their word.

Disabled People's Organisations Australia's open letter to Acting Attorney-General Michaelia Cash can be found [here](#).

You can write your own letter to the Acting Attorney-General or call her office via:

senator.cash@aph.gov.au

(08) 9226 2000

Get help from Villamanta to make your Submission to the Royal Commission

Villamanta Disability Rights Legal Service Inc. ("Villamanta") is looking for people with a disability who have suffered from violence, abuse, neglect or exploitation in Victoria, to take part in the Disability Royal Commission and have their voice heard.

Villamanta can help you:

- Write a written submission to the Disability Royal Commission (DRC) that tells your story and expresses the problems you see within Australia's current systems of disability care, as well as offering suggestion on how to change these issues;
- Organise a public or private hearing with a Commissioner of the DRC in which you will be given the opportunity to tell your story yourself.

Villamanta offers free and independent legal advocacy for disability-related legal or justice matters.

If you would like to share your story you can contact us by telephoning (03) 5227 3338, or free-call 1800 014 111.

You could also email legal@villamanta.org.au

Access to Trams

A message from the Disability Resource Centre

The Disability Resource Centre needs your help! We have just launched a Get On Track petition to give a voice to our enormous frustrations about the lack of access to trams in Melbourne. As you know the government is ignoring its obligations under the Disability Standards for Accessible Public Transport and there is now no way it can meet the deadlines set in place 20 years ago. Please, please help us all spread the word by signing here [Change.org/GetOnTrack](https://change.org/GetOnTrack) and sharing the petition as widely as you can.

The sooner you can sign and share, the more impactful all our voices can be. Once we have over 500 signatures the petition is automatically sent to broader change.org mailing lists and we can build new partners and supporters. At this early stage building signatures is difficult.

There are also other ways to take action on our website [here](#).

Give Now

Donate to the Disability Discrimination Legal Service

Despite living in a wealthy developed country, Australians with disabilities experience extremely high rates of discrimination, abuse and neglect. This is why the Disability Discrimination Legal Service provides free legal services to those experiencing harm. We also work to improve conditions for all people with disabilities through community legal education and law and policy reform.

In the face of limited government funding, we need your support to expand our work, especially in the key areas of education and employment. Despite numerous parliamentary inquiries and government bodies uncovering widespread abuse and neglect, not enough has been done to improve matters. But we know that continual advocacy and litigation creates pressure for better protections. Every dollar you donate helps us to achieve this goal.

DDLS is an independent, non-profit community organisation. Many people with disabilities, volunteers and students contribute their efforts to our work
<https://www.givenow.com.au/DDLS>

Donations may also be made to Villamanta Disability Rights Legal Service Inc.

Villamanta does excellent work for people who have a disability and a disability-related legal issue. These people are often our most vulnerable citizens.
Any amount, no matter how small, will help us to make a difference for those who most need it!

You can help Villamanta to help Victorians who have a disability by donating using either PayPal or Credit Card via our website at www.villamanta.org.au

All donations greater than \$2 are tax deductible and a receipt will be sent to all donors

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