

Equality & Justice

for people with disabilities



June 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

Amongst more bad news for Victoria and another lockdown, at least the disability and advocacy communities received some long awaited for news, with the Disability Royal Commission being extended to 29 September 2023.

Concerns continue to be held about the accessibility of the Commission for people with severe to profound disabilities. The periods of lockdown in Victoria have done little to facilitate a resolution to this challenge. The extension gives us more time to lobby for increased access for people with disabilities.

Please note that Disability Discrimination Legal Service and Villamanta are currently operating from their offices..

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Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156

Summary

Ms Bou-Jamie Barber ('the Applicant') made an application under section 394 of the *Fair Work Act* in which she claimed that she had been unfairly dismissed from Goodstart Early Learning ('the Respondent'). In 2020, the Respondent introduced an immunization policy which required all staff members to receive an influenza vaccine unless they were medically exempt. As a result, the Applicant refused to take the vaccine on the grounds that she has a "sensitive" immune system and receiving the vaccine would be unsafe. In late 2020, the Applicant was dismissed due to her unwillingness and failure to obtain an influenza vaccination.

As per the facts of the case, the issues in question include:

- Whether mandatory vaccination policies are reasonable and lawful (whether a valid medical exemption was provided)
- Whether the Applicant satisfied the inherent requirements of the position
- Whether there was valid reason for dismissal based on the capacity or conduct of the Applicant

It was found that the mandatory vaccination policies were both reasonable and lawful. The Respondent's adoption of mandatory vaccination was reasonable because there were a variety of other controls that were considered with assistance of a medical specialist, and it was decided that those who were working in close proximity of children must be vaccinated due to their vulnerable nature regarding immunity.

Additionally, the policy was reasonable on the basis that it allowed medical exemptions and covered the expenses of receiving the vaccine. The mandatory vaccination policy was lawful because the policy was not outside the scope of the Applicant's employment contract.

The Applicant provided evidence from her Doctor that she reacts quite badly to the influenza vaccine. However, the medical exemption was deemed invalid because although she was provided with ample time to seek medical exemptions with costs paid for, she was unable to produce evidence that receiving the vaccine would be unsafe. In fact, multiple doctors refused to provide her with a statement that the vaccine would be unsafe. Her strongest argument consisted of a sensitive immune system, that she suffered from coeliac disease, and that she alleged that she had a reaction in the past (although, there was no record of the reaction). Therefore, none of the above satisfied that a medical exemption should have been granted.

As for the inherent requirements of the position, receiving a vaccination was found not to constitute an inherent requirement of the role. Nor did the Applicant lack the capacity to perform her role. The inability to perform an inherent requirement of the role is a valid reason for dismissal, but the same could not be said about failing to follow the policies in place.

Both parties established that the grounds of termination related to the capacity of the Applicant to comply with policy. The Applicant was given sufficient time to provide valid medical exemptions at the cost of the Respondent and was unable to provide evidence that would establish exemption from the influenza vaccine. Although the Applicant had the capacity to comply with the policy of the organisation, she had failed to do so due to being unable to provide the evidence required. Additionally, the Applicant's capacity affected the safety and welfare of other employees as it is required that the workforce to be vaccinated against influenza as a means of reducing transmission between children, families, and staff. The Respondent also submitted that the response to the hazard of influenza transmission in the workplace aligned with the regulations which the Respondent business must comply.

The application was dismissed on the basis that the dismissal was not unfair, as the policy was not adhered to by the Applicant and she was not granted medical exemption.

Ming Han v SAL National Pty Ltd

Statement of Facts

On 15 June 2020, Ming Han applied to the Human Rights List at the Victorian Civil and Administrative Tribunal claiming he has been directly discriminated against in the area of employment on the basis of the protected attribute of age.

Mr Han was going to apply for an office assistant position on an online Chinese community website called Yeeyi. However, the advertisement noted an age requirement for the position of 26-30 years. He called to seek clarification about this. Fei Rong, the person representing the company, affirmed the age requirement criteria, acknowledging that it was an entry level position and therefore he had no choice but to select an age range when posting the advertisement. As Mr Han was older than this, he thought it would be useless for him to apply and so he didn't.

Mr Han claimed to have experienced hurt, humiliation and loss of potential income as a result of the experience and therefore sought compensation of \$15,000.

Legal Issues

Mr Han submitted that the job advertisement treated him, or proposed to treat him, unfavourably. It conveyed that he was not suitable and therefore would not be considered desirable for the role due to his age. Accordingly, Mr Han submitted the Respondent directly discriminated against him because of his age in breach of the Equal Opportunity Act ("EOA"). Mr Han claimed to have experienced hurt, humiliation and loss of potential income as a result of the experience.

A key component of the evidence was a conversation between Mr Han and Mr Rong, recorded by Mr Han, proving that he was discriminated against by SAL National Pty Ltd. This recording was admitted as evidence.

Response to Claim

Council for SAL National noted while the recording was not illegal, it was improper, as it had been taken to create a claim without consent and had been selectively edited by Mr Han to remove the beginning of the call where he spoke to head office and established details of the company.

Mr Rong gave evidence at the hearing. He stated his manager had emailed him content for the advertisement which had not specified an age range for the position. When publishing the advertisement on the website, he did not notice there was an option to click "unlimited" for age range. Accordingly, he thought he had to choose an age range and selected 26-30 as it was an entry level job and thinking he had to select something, he did so, not because the position had an age requirement.

Mr Rong said of the recorded conversation that he invited Mr Han to send a resume and reiterated there were no age requirements. He stated that Mr Han asked the same question repeatedly, and he felt pressured and intimidated. Due to wanting to finish the conversation, he gave in and agreed that literally speaking, the published advertisement had included an age range.

Upon realising there was an option to click “unlimited” Mr Rong corrected the advertisement. Mr Rong subsequently sent a letter to Mr Han explaining his mistake and apologising.

Counsel for SAL National submitted there was no unfavourable treatment. Mr Han never applied for the job. There was no evidence of humiliation on the phone call, and Mr Han was expressly invited to apply for the job. He was told several times there was no age limit.

Conclusion

For a claim to be proven, an applicant must establish that he or she has a particular protected attribute and that there was unfavourable treatment that was substantially because of that protected attribute.

Mr Han claimed the attribute was age; that he was treated unfavourably due to not being between the ages of 26-30.

While Deputy Nihill accepted Mr Han did not fall within the specified age group, she was not satisfied there had been unfavourable treatment. Mr Han was encouraged to apply for the job. He did not apply, so it could not be said he was denied the job or an interview because of his age. No one told him he was not the right age for the job.

Accordingly, not satisfied Mr Han has been discriminated against within the meaning of section 8 of the EOA, the application was dismissed.

FBJV and National Disability Insurance Agency [2021] AATA 913 (19 April 2021)

Interesting NDIS case about what sort of disabilities they accept in their scheme.

The applicant, FBJV suffers from endometriosis causing chronic pain.

Their application to become a participant in the NDIS rejected on the basis FBJV did not satisfy the access criteria in ss 24 and 25 of the NDIS Act.

FBJV applied to the Administrative Appeals Tribunal (AAT) to review this decision, pursuant to s 103 of the NDIS Act.

FBJV provided medical evidence to argue she meets the access criteria for NDIS. The applicant submitted:

- Pursuant to s 24(1)(b) of the NDIS Act, her endometriosis and chronic pain result in permanent impairment;
- Pursuant to s 24(1)(c) of the NDIS Act, she has substantially reduced functional capacity for mobility;
- Pursuant to s 24(1)(e) of the NDIS Act, she is likely to require support under the NDIS for her lifetime due to the permanency of her impairment;

- In relation to s 25, early intervention requirements could be met if she has access to early intervention supports that are most appropriately funded by NDIS.

Several practitioners provided reports of her condition and its effects, including her laparoscopic surgeon, gynaecologist, GP, obstetrician gynaecologist, physiotherapist, exercise physiologist and occupational therapist.

The AAT had to consider whether FBJV meets all the requirements specified in s 24(1)(a) to (e) of the NDIS Act for access to the NDIS. Consideration was given to whether her impairments result in “substantially reduced functional capacity” to undertake any one or more specified activities. The Tribunal found that while FBJV’s disability is painful and impacts her everyday life, it is not permanent within the definition of the NDIS Act. Therefore, FBJV does not meet the access criteria under s 21 of the NDIS Act to become a participant in the NDIS.

Nottle and National Disability Insurance Agency [2021] AATA 1014 (9 April 2021)

Assistance animal decision

The applicant, Ms Nottle, has been a participant in the NDIS since May 2018.

She receives funding under a participant plan for her hearing assistance dog (Bunji). However, Bunji is nearing the end of his working life so she requested the NDIS to fund the cost of purchasing and training another dog (Eddie).

The issue here is whether the NDIS should concurrently fund two assistance dogs - Bunji who is currently trained, certified and providing assistance to Ms Nottle, and at the same time, a second dog who is still being trained and not yet certified (Eddie).

Ms Nottle’s request was denied on the basis that she is not entitled to receive funding for a dog that is not her hearing assistance dog (Eddie) and it would duplicate a support already funded.

The Administrative Appeals Tribunal reviewed the NDIA’s decision. It considered whether funding for the training of the assistance dog (Eddie) constituted reasonable and necessary support under s 34(1) of the NDIS Act.

The decision made by the NDIA was set aside by the Tribunal and remitted to the NDIA for reconsideration bearing in mind the direction that the funding for training the hearing assistance dog, Eddie, was a reasonable and necessary support for Ms Nottle.

Neumueller and National Disability Insurance Agency [2021] AATA 1049 (23 April 2021)

The substantive application to the Tribunal concerned the Applicant's request for funding for modifications to her vehicle.

The issue was whether the Tribunal has jurisdiction to review the decision before the NDIA has made an internal reviewable decision. The Tribunal had to assess whether a decision of a reviewer, pursuant to s 100 of the NDIS Act was made, only after which the Tribunal has jurisdiction to review.

In assessing the Tribunal's jurisdiction, reference must be made to whether a reviewable decision and a request for a reviewable decision have in fact taken place under the NDIS Act. In this regard, the Tribunal found that:

1. The Tribunal did not accept the applicant's assumption that the communications between her and the Agency constituted an official request for review;
2. The Tribunal was satisfied the communications did not provide a basis for asserting that the Agency had made a primary, reviewable decision;
3. The Tribunal concluded that there must first be a request for a review of a reviewable decision, otherwise the provisions in s 25(5) of the AAT Act do not apply.
4. The applicant's application for review was dismissed.

Disability Royal Commission

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

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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