Equality & Justice for people with disabilities

Disability Discrimination Legal Service Inc

March 2023

THE ADVOCATE

In this edition

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

The Disability Discrimination Legal Service has just launched a new service which we are very excited about. It is aimed at women with disabilities who have been sexually harassed or discriminated against in the workforce. Read about it on page 2.

At the moment, we are in the process of developing a new strategic plan. The Management Committee is interested to hear from you about what you believe our priorities should be for the next three years. Contact me on manager@ddls.org.au with your thoughts.

For those of you who are concerned about the accessibility of the legal processes in relation to the Disability Discrimination Act, the Attorney General's Department is conducting a review.

It's vital that people with disabilities have access to federal discrimination laws as well as state discrimination laws, without the threat of losing everything they have.

Have your say on this important topic.

https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/

Julie Phillips
Manager
Disability Discrimination
Legal Service

NEW HARASSMENT SERVICE FOR DDLS

Sexual harassment/discrimination for women in the workplace

Are you a woman who has been subjected to sexual harassment or discrimination in the workplace?

Do you have a disability - or do you think you have acquired a disability or illness due to your treatment? Not sure? Call us.

DDLS has commenced as of January 2023 a four year project which expands our services to dealing with workplace issues under the Fair Work Act as well as state and federal discrimination laws.

To book an advice appointment, call us on 9654-8644 or email on info@ddls.org.au. Telephone advice appointments are available during regular business hours and Wednesdays after 5 PM.

If you have been terminated from your employment, please tell whoever you contact at our organisation that you need an urgent appointment so we can assist you to meet any deadlines under the Fair Work Act.

If you have been terminated from your employment and you have NOT made an application under the Fair Work Act, please tell whoever you contact at our organisation that you need an urgent appointment.

Is there a group of people you think might like a tailored workshop on this subject? Contact us.

A roundup of some discrimination cases from 2022.

ASQ V HARCOURTS RARA AND CO PTY LTD (HUMAN RIGHTS) [2022] VCAT 139 (11 FEBURARY 2022)

Issue: Disability discrimination in area of provision of services and failure to make reasonable adjustments. Request for certificate proving exemption from requirement to wear a mask is direct discrimination.

Summary of facts:
In 2021, the applicant attended an 'open house' inspection conducted by the respondent who conducts a real estate business. The Respondent's staff requested that the applicant wear a mask when entering the property. The applicant told them he did not need to wear a mask on medical grounds and wanted to enter the property. He was asked for his medical certificate to which he replied that he was not required to provide it. They said the company policy was to ask for one. The applicant left and returned with information from the Victorian Government website on his phone which provided that no certificate was required for people with medical conditions which made mask wearing suitable. Staff of the respondent allegedly refused to look at the information, Giving rise to the applicant's direct discrimination claim against them.

Findings:

The Tribunal referred to s 44 of the DD Act which prohibits discrimination in the provision of services. The Tribunal held that whilst the Victorian Government website stated one did not need to provide a certificate to prove a lawful excuse to not wear a mask, it also stated that a request for the certificate may be reasonable in certain circumstances where it is reasonably necessary to protect the health and safety of other people.

The Tribunal held that by asking the applicant for a certificate when he was not required to provide one, the respondent had unlawfully discriminated against the applicant, the circumstances in which it had occurred and the response of the applicant did not warrant any further action.

BOUZERAMD V OLIVO (HUMAN RIGHS) [2021] VCAT 850

Issue: Sexual harassment/assault under the Equal Opportunity Act

Summary of facts:
On 19 November 2019, the Applicant and Respondent were working together at Bistrot. After the conclusion of their shift, the Applicant and Respondent were drinking wine together. Having drunk one and a half glasses of wine, the Applicant left the Respondent's presence to use the bathroom. When she returned, the Respondent had poured her another glass of wine. The Applicant noticed it tasted unusual, and she remarked to the Respondent it was 'like chemicals'.

The Applicant says she lost consciousness and awoke to being sexually penetrated by the Respondent. The Applicant says that she did not consent and did not have the opportunity to consent to the penetrations. The Applicant's Counsel further submitted that: This penetration was an act of physical intimacy under s 92(2)(a) of EO Act. It was also an unwelcome sexual advance and unwelcome conduct of a sexual nature for the purposes of s 92(1) of the EO Act, as the Applicant was unable to and did not consent to the penetrations; and as a result of being sexually penetrated without her consent, the Applicant felt offended, humiliated and intimidated.

Findings:
The Tribunal found that the Respondent contravened s 78(1) of the VCAT Act and Part 6 of the EO Act in that he sexually harassed the Applicant contrary to s 93(2)(a) of the EO Act. The Tribunal made orders for the Respondent to pay damages of $150,810.00 to the Applicant for loss, damage and injury suffered in consequence of the Respondent's sexual harassment.

PHILLIPS V HOBAN RECRUITMENT (HUMAN RIGHTS) [2021] VCAT 934

Issue: Disability discrimination in area of provision of services

Summary of facts:
On 13 January 2020, the Applicant boarded a Metro Trains replacement bus at Hastings Station. The Applicant entered by a rear door and had with him two large dogs. A number of passengers panicked when the Applicant and his dogs boarded the bus. The bus driver refused to drive the bus while the dogs were on board and called the Police. Because of the driver's refusal to drive while the dogs were on board and concerns that it was unlawful for the applicant to travel on the bus with his dogs, a Hoban employee boarded the bus and asked the Applicant to disembark with his dogs. At no stage did the applicant show the Hoban staff member, the bus driver or Police, an Assistance Animal Pass or other documentation about the status of his dogs. Police then attended and demanded that the Applicant disembark with his dogs. When off the bus, the Applicant argued with the Respondent's employees and claimed that it was illegal to not let him travel with his dogs. At a directions hearing on 18 August 2020, the presiding member asked the Applicant to consider if he had named the correct Respondent given that Hoban Recruitment was not in control of replacement buses.

Findings:
It was found that it was not Hoban Recruitment that denied the applicant the service of being transported on a bus. The Applicant did not dispute the Respondent's submission that the bus driver (not an employee of Hoban Recruitment) had refused to drive the bus while the applicant's dogs were on board and/or that it was ultimately the Police who demanded that the Applicant and his dogs exit the bus. The application failed because the Applicant alleged that Hoban Recruitment denied him a service, but it was not Hoban Recruitment that denied him the service. It was held that Hoban Recruitment did not, on 13 or 14 January 2020, discriminate against the Applicant by denying him with a service.

KIMHI V SA DRAINS PTY LTD [2022] FEDCFAM C2G 227 (18 MARCH 2022)

Issue:
Whether Kimhi was unfairly dismissed from his employment due to his disability.

Summary of facts:
The applicant was employed by SA Drains as an apprentice plumber on 27 December 2018. During his term of employment, the applicant contracted dermatitis in April 2019 and as a result of that he made an application for workers compensation. Five months following him contracting dermatitis, the applicant was terminated from his employment. The applicant brought a claim to the fair work commission as he believed that he had been subject to adverse action because of his disability. He brought claims under ss 117 and 125 of the Fair Work Act ("FWA") as he claimed that his employer did not provide him with an information sheet outlining his rights and entitlements when he started at the job, however his employer argued otherwise. The applicant also claimed that he did not receive the appropriate Plumbing and Fire Sprinklers Award 2020 ('the Award') payment upon his termination, which his employer asserts was accessible to him upon his termination. The applicant also brought a claim under the DDA as he believed that he was discriminated against in the workplace in particular under ss 3, 6, 11 and 15 of the DDA and that he was terminated from his employment because he had contact dermatitis. The applicant also claims that between February and March 2019 he endured verbal abuse in the workplace which consisted of him being called 'wussy', 'big baby' etc… and as a result he acquired a psychological condition which he described as an inferiority complex.

Findings:
Regarding the claim that he was terminated based on his disability it was unclear as to whether the termination fell under the DDA or the FWA. The applicant did suffer some form of prejudice as a consequence of having contracted dermatitis during his term of employment and endured some form of bullying in the workplace due to his disability.

The applicant had been in his employment for less than 12 months and was entitled to one week's pay upon his termination and was in fact paid for two weeks.
The judge stated that it would have been more appropriate for the parties to undergo mediation to try and resolve the dispute between themselves.

The judge found that it would be a significant act to deprive the applicant of the opportunity to bring the case therefore he did not dismiss the case. However, if the matter could be remedied by an Award of costs, the case should be adjourned.

There was no evidence to rebut the respondent's claim that there has been no less favourable treatment in regard to how the applicant was treated in the workplace.

Orders:
That the costs of the proceedings be paid by the applicant's lawyer as it his fault that the proceedings were delayed.

CAVANAGH V LEXASTAR PTY LTD [2021] FEDCFAM C2 375 (22 DECEMBER 2021)

Issue:
Whether the applicant was terminated from his employment because of his disability.

Sub-issues:
Whether the respondent knew that the applicant suffered from a disability.

Whether the applicant was asked and consented to change from full time to causal employment.

Whether the applicant was unlawfully dismissed.

Whether the applicant obtained leave before being terminated.

Whether the respondent was required to pay the applicant one or two weeks in place of notice of dismissal.

Summary of facts:
The applicant was employed by the respondent, Lexastar, from 3 December 2018 to 3 February 2020 as a machinist on a causal basis. James was then offered full time employment which he accepted on March 2019 The other respondents were Peter Cliento who is a director of Lexastar, Ronald Cliento who was the sales manager, and Mary Cliento who was the financial controller.

The applicant was diagnosed with anxiety in August 2016 when he began to experience panic attacks and anxiety as a result of the breakdown of his marriage. He stated that he started seeing a doctor and a psychologist however he did not provide the respondents with any medical certificates when starting his job at Lexastar, which confirmed that he had a disability. Mr Cavanagh was informed of the job at Lexastar by his friend who recommended him to Peter and Ranald Cliento and told them that Mr Cavanagh was a recovering drug addict who had been in prison, but did not tell them about Mr Cavanagh's disability or that he suffered from depression and anxiety. Mr Cavanagh claimed that Mary knew about his disability and that Mary Cliento had discussed it with him and other people. The applicant claims that Ranald, Mary and Peter Cliento were aware of his medical appointments with his psychologist and doctor due to his anxiety and depression. Ms Cliento claimed that she was never informed by Mr Cavanagh as to why he was absent from work. Ranald Cliento also claimed that the medical certificates that he received did not state that Mr Cavanagh had a disability and that Mr Cavanagh would tell him that he had a headache or was hungover and could not come to work as a result. Mr Cavanagh was asked by the respondents if he wanted to change to casual employment because of his absences. Ranald Cliento decided to terminate Mr Cavanagh's employment because he became unreliable, as he had missed to many work days.

Findings:
The Court found that Peter and Ranald Cliento were not told or aware that Mr Cavanagh had a disability, in particular anxiety and depression. The Court found that Ms Cliento did not speak about Mr Cavanagh's mental health issues with everyone as there was no evidence to prove this. The Court decided that Ranald Cliento was not made aware that the applicant had a disability and that this was the reason why he was absent from work. Mr Cavanagh was aware that the

respondents found him to unreliable and he offered to resign, however, they did not accept his resignation and offered him causal employment which Mr Cavanagh accepted. The judge found that the change of Mr Cavanagh's employment from full time to casual did not constitute an adverse action under s 342(1) FWA as he had consented to the change. The judge decided that Mr Cavanagh was not dismissed because he was temporarily absent from work. The judge found that a disability support worker did come in to support Mr Cavanagh to keep his job, and following this, the respondents became aware of that Mr Cavanagh' suffered from a disability. The judge also found that James was not terminated because he had a disability but instead because he was absent from work on multiple occasions without medical certificates which is not unlawful under the DDA.

Orders:
The application was dismissed.

PROF. MASUDA BEHNIA V MACQUARIE UNIVERSITY [2022] FWC 160 (25 JANUARY 2022)

Issue
Whether the university was required to make, or had made, reasonable adjustments in regard to the applicant's disability in regard to selecting who would become redundant.

Summary of facts
The applicant started his job at the university as a Professor in the Graduate School of Management in 2015. In April 2016, the applicant was hit by a car while riding his bike which resulted in him acquiring an injury to his right shoulder. It was not in issue that before the selection of redundancy, the university had made reasonable adjustments for the applicant in regard to his injury.

The university decided to cut staff costs and decided who would be made redundant by ranking staff based on their merit and performance. On 3 September 2021, the applicant notified the university that he would be making a claim against them based on the university failing to make reasonable adjudgments based on his disability in the course of selecting him for termination by reason of redundancy.

Findings
The judge found that the respondent had made a decision, and that decision was to terminate the applicant's employment by reason of redundancy, which was in accordance with the employment agreement.

Order
The application was dismissed.

Matthews v Woombye Pub Trading Pty Ltd [2022] QCAT 301

Issue:
Whether the respondent, Woombye Pub, had discriminated against the applicant, Raymond Matthews, on the basis of his disability by denying him access to the pub because of his companion dog.

Facts:
The applicant had suffered from anxiety and depression since 2014. He obtained a Translink Assistance Animal Pass for his assistance dog Kooy2 which was valid till February 2023. The pass included a colour photo of Kooy2 and identified the applicant as the handler.

The applicant was permitted to take Kooy2 inside with him to the pub prior to a change in management in November 2017 which resulted in new rules being implemented. Between 2017 and 2020, the applicant had been denied access to the premises on several occasions and on one occasion, was banned from the pub for 1 month in September 2020.

The applicant was told that the Translink Pass was insufficient documentation and employees demanded official documentation identifying Kooy2 as an authorised assistance dog.

In 2020, the applicant lodged a complaint with the Queensland Human Rights Commission seeking $50,000 compensation. The substance of the complaint was that the applicant had been denied access to the pub and had been banned for 1 month. The matter was referred to the Queensland Civil and Administrative Tribunal.

Relevant Law:
Section 46 of the ADA which provides:

(1) A person who supplies goods or services (whether or not for reward or
  (a) profit) must not discriminate against another person—
  (b) by failing to supply the goods or services; or
  (c) in the terms on which goods or services are supplied; or
  (d) in the way in which goods or services are supplied; or
  (e) by treating the other person unfavourably in any way in connection with the supply of goods and services.

Respondents Argument:
In its defence, the respondent argued that its refusal of the applicant and Kooy2 was due to the liquor laws which stipulated that pubs must provide a safe environment for patrons. However, this argument was rejected on the basis that the refusal was not a necessary act for the purpose of complying with the relevant provisions.

Holding / Ruling:

Kooy2 was held to be an assistance dog within the meaning of the ADA.[1] The applicant was found to have been treated less favourably than a customer at the pub who did not suffer from anxiety or depression and who did not rely on an assistance dog.[2]

The respondent was ultimately found to be in contravention of s 46 of the ADA and was ordered to pay the applicant $8,000 in damages.

[1] [48].
[2] [64].

CARPENTER V PEARLY WHITES PTY LTD (HUMAN RIGHTS) [2022] VCAT 623

Issue/Facts:
Fiona Carpenter (the Applicant) was employed as a dental assistant on a casual basis by Pearly Whites Pty Ltd (First Respondent), whose sole director is Doctor Terry Wong (Second Respondent). The Applicant wasemployed from March 2017 until 19 July 2020, when the First Respondent terminated the Applicant's employment.

The Applicant, who is female, is a parent to two school-aged children with family responsibilities, and sustained a non-work related injury on 13 July 2020. She informed her employer of this injury on 14 July 2020. On 19 July 2020, she received an email from the Second Respondent informing her that a new permanent staff member had been employed as of 9 July 2020 and that the Applicant would no longer be offered casual hours. The Applicant alleged that she was selected as the casual to lose her job due to the disability that she had acquired, being the injury to her foot, and also claimed that the First Respondent was vicariously liable for the actions of the Second Respondent. The Applicant also alleged thatshe was treated unfavourably by the Respondents because of her sex. The Respondents however, claimed that the reason the Applicant was selected for dismissal was due to her conduct issues at work.

The claim that the Applicant's employment was terminated due to her disability was dismissed, similar to herclaim of sex discrimination being the reason for her dismissal from the First Respondent, also being dismissed. Their Honour also dismissed the claim that the Applicant was dismissed because of a combinationof her sex and her parental status claim in conjunction with one another.

Findings and Orders:
It was found that the Applicant was subjected to unlawful discrimination by the First Respondent on the basis of the attribute of parental status, or status as a carer in contravention of sections 8(1) and 18(b) of the Equal Opportunity Act 2010 (Vic) (EO Act), as well as it being found that the Applicant was subjected to unlawful indirect discrimination by the First Respondent, on the basis of the attribute of parental status or status as a carer in contravention of section 9(1) of the EO Act. The First and Second Respondent were ordered to pay the Applicant $2,000.00 for general damages and $10,000.00 for economic loss, both within 28 days from the date of the order.

Finding of Direct Discrimination:
Their Honour found that the First Respondent contravened sections 8(1) and 18(b) of the EO Act, as it was found through the examination and cross-examination of the evidence that the

Applicant was treated unfavourably by terminating her employment because she possessed the attribute of parental status which included the characteristics of family responsibilities and limited work availability. The finding of direct discrimination in regard to termination of the Applicant's employment, was supported by the following factors;

- Ms Her, the employee who did the rosters for the dental office, was frustrated with the Applicant's availability, as well as being frustrated when the Applicant would cancel shifts with late notice due to her family responsibilities.
- The Second Respondent was aware of the Applicant's family responsibilities and rostering issues. The Second Respondent maintained that he was not aware of the rostering issues with the Applicant, however, in his evidence, he asked the Applicant for an update as to her availability on 17 June 2020 which he then passed on to Ms Her. In a similar way, at the conclusion of the dismissal email sent to the Applicant by the Second Respondent, he stated "[…] I […] wish you the very best to you and your family."
- The Second Respondent says that he made the decision to dismiss the Applicant "then and there" (this being at the conclusion of the interview with the new permanent employee on 9 July 2020), however in his witness statement dated 9 February 2022, he took up most of 10 paragraphs explaining how he analysed the "position, experience and performance" of each of the six casual employees, employed by the First Respondent.
- The reason given by the Second Respondent for the Applicant's termination, via email, dated 19 July 2020, stated that the termination was "Due to the current challenging circumstances and the need for more stability at the workplace". However, in his witness statement, the Second Respondent claimed that he meant stability to mean "the need for business continuity". The Applicant's termination was at odds with the Second Respondent's cited aim to main "stability" and "continuity."
- Their Honour concluded that the Second Respondent had concerns with the Applicant's availability, however did not have any issues with the other employee's availability, as on 17 June 2020, the Second Respondent asked the Applicant to provide the Practice with an update as to her availability.

The finding of direct discrimination as a contravention by the First Respondent was found in conjunction with the Second Respondent being vicariously liable for the actions of the First Respondent. The First Respondent is subject to the directions and leadership of the Second Respondent, therefore having all final decisions made and given approval by the Second Respondent.

Finding of Indirect Discrimination:

The Applicant alleged that the Second Respondent, contravened section 9 of the EO Act, on the basis of the attribute of her parental status. The Applicant alleged that the Second Respondent implemented a requirement in order to "bring more stability" to the workplace. The Applicant claimed that the Second Respondent identified categories of employees who were not considered for termination on the basis of availability. The finding of indirect discrimination in regard to termination of the Applicant's employment, was supported by the following factors;

- The authority in the case of Waters v Public Transport Corporation [1991] HCA 49, (1992) 173 CLR 349,was accepted by their Honour that a “requirement” or “condition” need not be explicit but can be impliedfrom the circumstances. The implied requirement of more stability is implied in the Practice as there is a preference for staff attendance to be more available.
- This implied requirement made by the Second Respondent had the effect of disadvantaging the Applicant.The requirement for the Applicant to be more available is a disadvantage to her due to her family responsibilities.

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

Our Organisation

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